



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

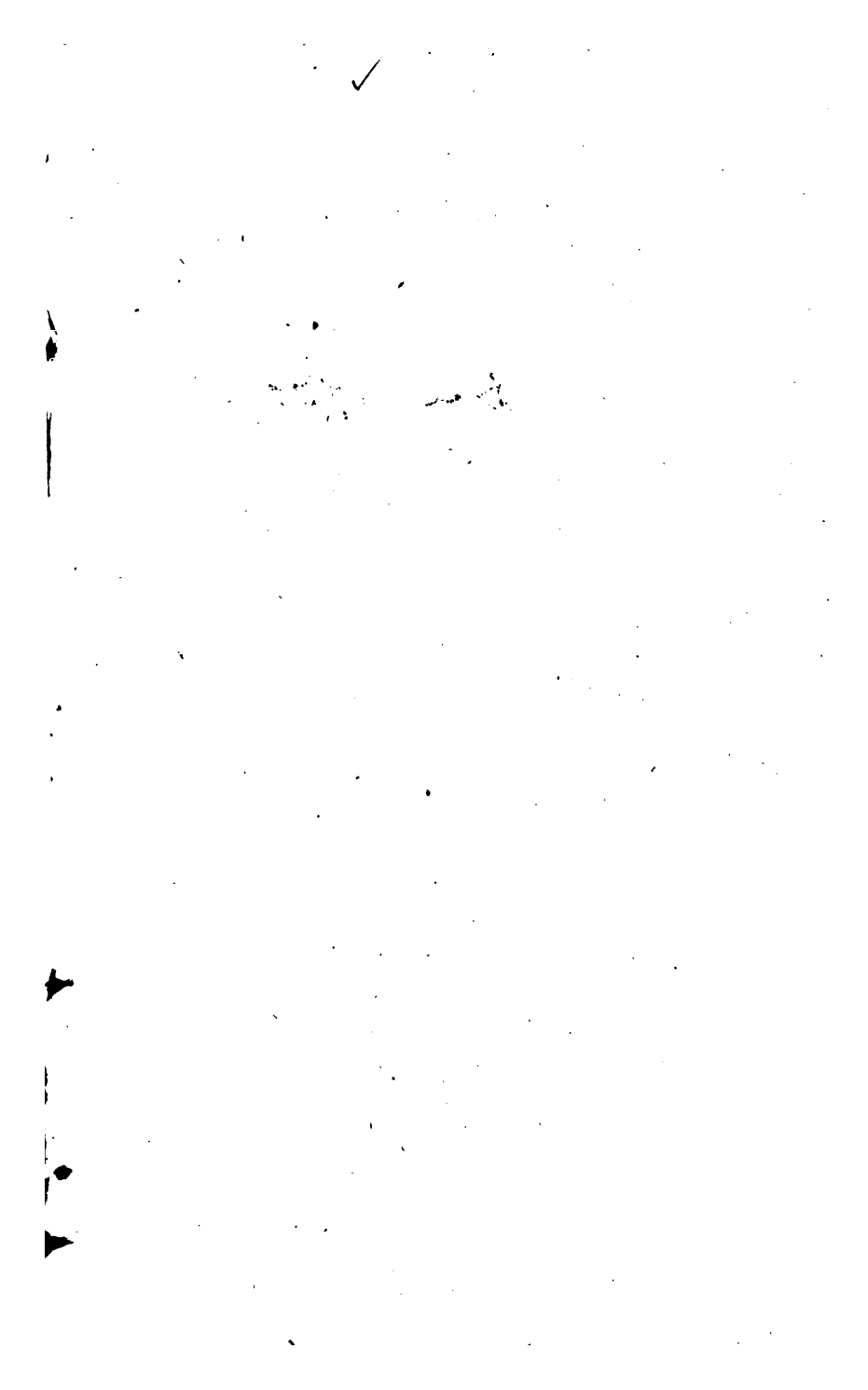
We also ask that you:

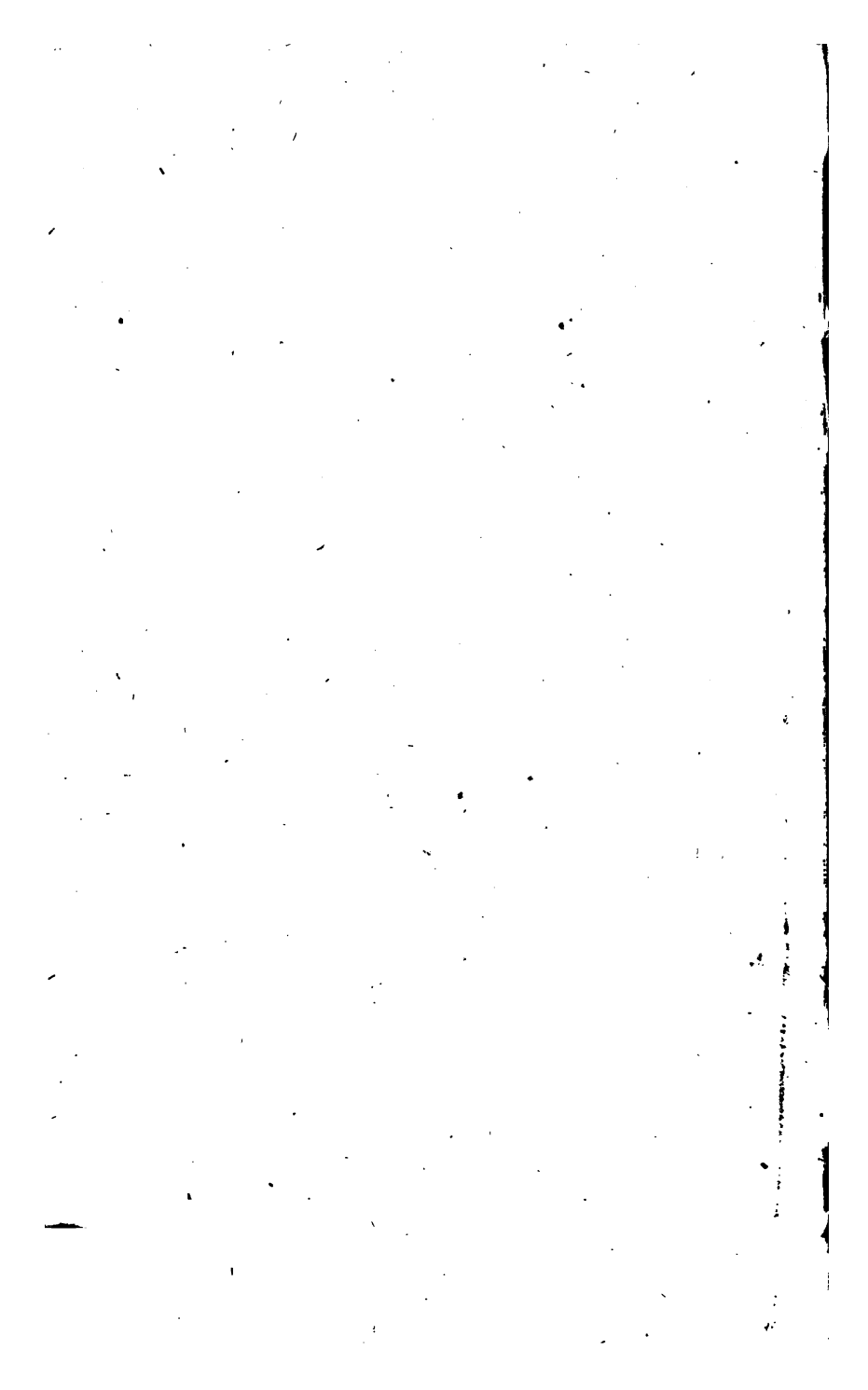
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

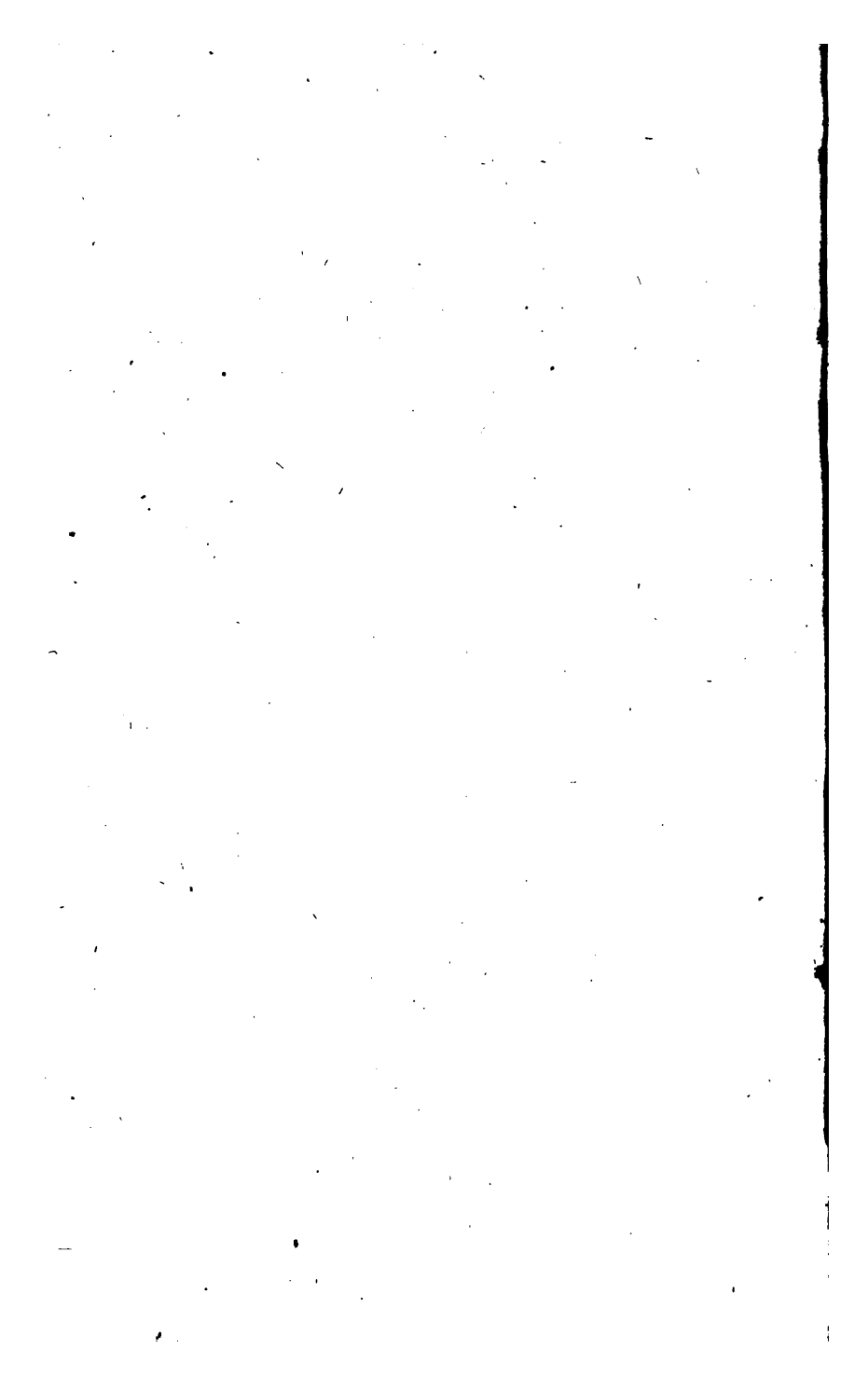
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Forrest E. Singer
Philadelphia
Dec 1922





FF
AAR
DNe



A
COMPENDIUM
OF THE
LAW OF MARINE INSURANCES,
BOTTOMRY, INSURANCE ON LIVES,
AND OF
INSURANCE AGAINST FIRE :

IN WHICH THE MODE OF CALCULATING AVERAGES IS
DEFINED, AND ILLUSTRATED BY EXAMPLES.

BY *ALEXANDER ANNESLEY*,
OF THE INNER TEMPLE, SOLICITOR.

Nihil legebat quod non excerperet....Plin. Epist.

MIDDLETOWN, (CONN.)

PRINTED FOR I. RILEY, NEW-YORK.

.....

1808.

*RICHARD ALSOP, Printer,
Middletown, Connecticut.*

P R E F A C E.

WHEN the vast extent and increase of the commerce of Great Britain and its dependencies are considered ; and when that important branch of commercial enterprise, " Marine Insurance," is adverted to, a Compendium, embracing the law and doctrine on the subject, tending to a solution of the doubts and removal of the difficulties which hourly occur in the intercourse between the assured and assurer, cannot prove unacceptable to the persons principally interested in those commercial contracts.

The present excellent system of maritime jurisprudence, so enlarged in principle, and liberal in practice, is detailed in works too voluminous to afford a ready and practicable reference to the merchant, the broker, or the underwriter ; the Compiler, therefore, has abridged the law and the dicta on adjudged cases of insurance, arranging the whole under distinct heads, to serve as a vade mecum to every class of readers,

who may comprehend with facility, and decide with confidence.

Such an arrangement, forming an epitome of the existing laws and adjudged cases on this important and complicated branch of British jurisprudence, in which a systematic distribution is framed of the general principles of each title, supported by references to the authorities establishing those principles, adapted to general use, and of a size sufficiently portable to assist the merchant, broker, and underwriter as a repertory on all occasions, will, the Compiler flatters himself, be found a work of some utility.

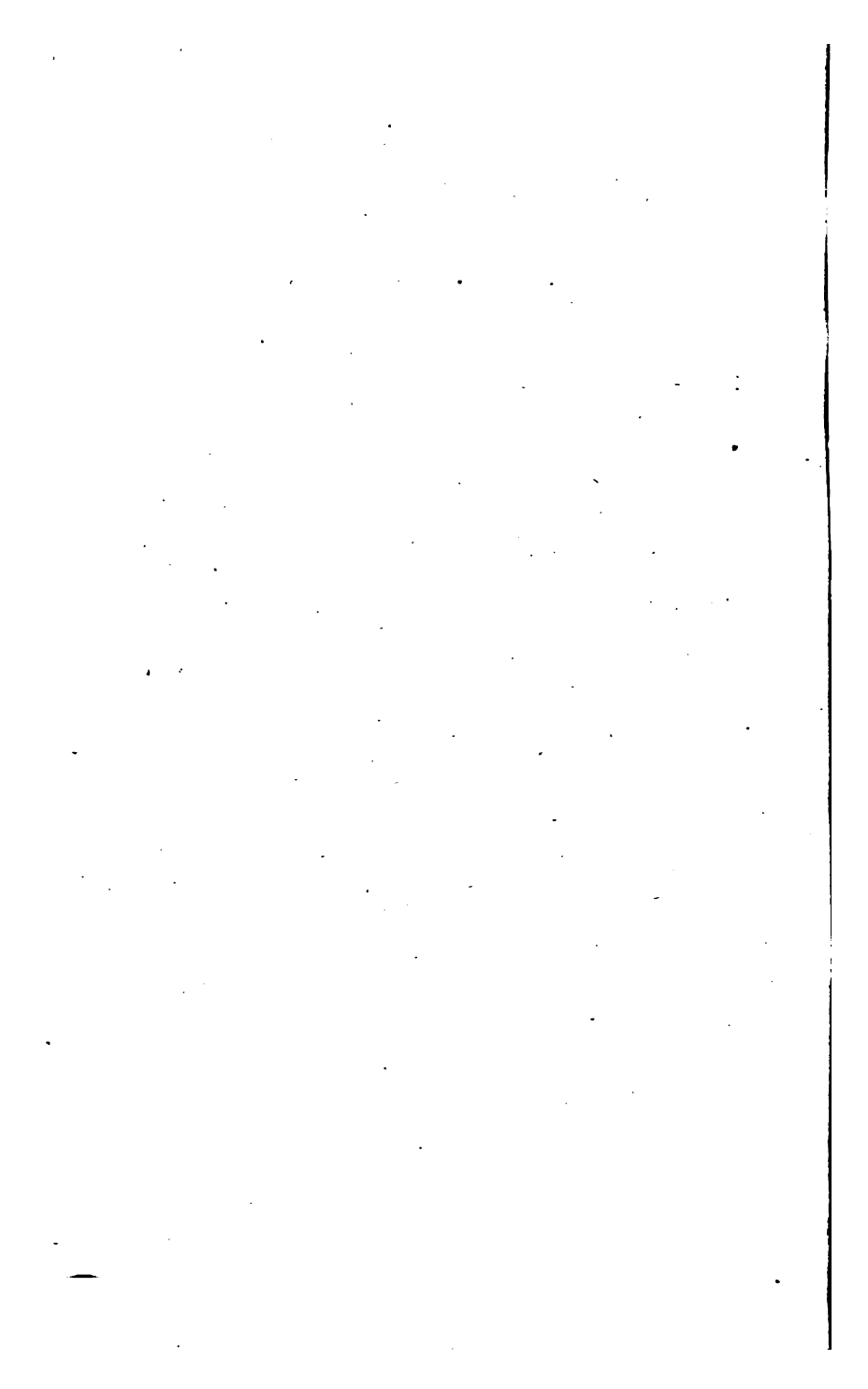
Drawing from the purest sources and most authentic materials, abridging rather than copying, arranging rather than illustrating principles, the Compiler's chief merit (should any attach) consists in compressing the variety of matter which forms the fruitful subject on which he treats.

In the arrangement of the Compendium, the very judicious plan of Mr. Park has been followed, beginning with the Policy, the foundation upon which the entire superstructure is raised, descending to a more particular view of the subject, and entering into the

minutiae of the system of British maritime law with all possible brevity, without losing sight of that degree of accuracy and perspicuity which can alone constitute the merit of a work of this nature.

Although much time and attention has been bestowed in the execution of this Compendium of the Law of Insurance, yet the Compiler is conscious that many omissions may be discovered in it; but such must be the case in every attempt of this nature. Those most conversant in our law, will be sensible of the impossibility of attaining, or even approaching to such a degree of perfection as to render a work of this nature faultless. The Compiler trusts, therefore, he shall experience every degree of indulgence from a candid and liberal public.

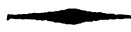
He deems it necessary, however, to preface his Compendium of the Law of Marine Insurance by a summary account of the rise and progress of navigation and commerce, by way of Introduction.



INDEX

OF

CASES CITED.



A		Page.
	Atty, Dawson v.	33
	Aubert v. Maze	6
ABEL, M'Garthy v.	117	Audley v. Duff 167
Aguilar, Geyer v.	45-75	Aveson v. Ld. Kinnaird 215
Aguilar v. Rodgers	167	
Airy v. Bland	18	B
Allen, Long v.	171	
Alston v. Campbell	154	Backhouse v. Ripley 96
Anderson, Camden v.	27-157-164	Badcock, Sadler Comp. v. 228
Anderson v. Pitcher	42	Barber v. Fletcher 125
Anderson, Parr v.	140	Barclay v. Cousins 8
Anderson v. Edie	203	Baring v. Day 112
Anderson, Minet v.	24	Baring v. Christie 43
Anderson v. Roy. Ex.	118	Baring v. Roy. Ex. Ass. 44-75
Ass. Co.	64-169	Barnard v. Bridgman 178
Andree v. Fletcher	24	Barnard, Wright v. 62
Angerstein v. Bell	204	Barnevelt, Pawson v. 38
Angerstein, Tidswell v.	204	Barrass v. Lond. Ass. 26
Appleton, Bird v.	46-128-157	Barrell, Dick v. 133
Astock, Bird v.	94	Barton v. Wolliford 189
Assevedo v. Cambridge	144	Bates v. Graham 10
		Beale v. Thomson 82

CASES CITED.

ix

Cocking v. Fraser	90-105	Dutrey, Marsham v.	100
Cockran, Randall v.	113	Dwyre v. Edie	202
Cologan, Smith v.	22		
Cooke, Rothwell v.	43	E.	
Coulter v. Macnair	156		
Cousins, Barclay v.	8	Eames, Waples v.	23
Cowley, Camden v.	25	Earle v. Rowcroft	87
Cox v. Liotard	208	Easterby, Rex v.	129
Cox v. Parry	11	Eden v. Parkinson	42-142
Crawford v. Hunter	12	Eden v. Poole	29
Crauford v. Lucena	53	Edgar v. Fowler	19
Crosedale, Gardiner v.	51	Edie, Anderson v.	203
Curling, Brandon v.	32	Edie, Dwyer v.	202
		Edie, Mitchell v.	114
		Edie, Play v.	11
		Edie, Rotch v.	8
Da Costa v. Newnham		Egginton, Montgomery v.	25
	96-114	Elmslie, Bowring v.	92
Da Costa v. Firth	155	Elliot v. Wilson	135-138
Dalzell, Lynch v.	223	Elton v. Brogden	85-135
Dandy v. Turner	186	Ewer, Lilly v.	40
Dawson v. Atty	33	Ewer, Robertson v.	29
Day, Baring v.	112	Ever, Walpole v.	191
De Frize v. Stephens	85		
De Ghetoff v. Lon. Ass.	48	F.	
De Guilder v. Depeister	188		
De Hahn v. Hartley	38	Farmer v. Legg	59
Delaney v. Stoddart	136-222	Farquharsen v. Hunter	28
Delmada v. Motteux	158	Farr, Le Pyre v.	144
Denison v. Modigliani	127	Fearon, Bush v.	195
Depaiba v. Ludlow	144	Felton v. Shaw	71
Depeister, Deguilder v.	188	Ferguson, Thellusson v.	
De Vignier v. Swanson	12		39-137
De Tastet, Webster v.	8	Firth, Da Costa v.	155
Dick v. Barrell	135	Fitzgerald v. Pole	152
Dixon, Litledale v.	127	Fitzherbert v. Mather	125
Dobson v. Bolton	90	Fletcher, Andree v.	64-169
Drinkwater v. Lon. Ass.	217	Fletcher, Barber v.	125
Driscoll v. Bovil	73	Fletcher, Bize v.	125
Driscoll v. Passmore	70	Fletcher, Lever v.	158
Duff, Audley v.	167	Fletcher, Milles v.	115
Dunlop, Stewart v.	125	Fletcher, Planche v.	124

CASES CITED.

Fletcher v. Poole	30	Gregson, Meyer v.	170
Fletcher, Thellusson v.	107-149	Green v. Young	79-137
Fletcher, Tyrie v.	169	Green, Sumner v.	176
Flint v. Le Mesurier	152	Green v. Brown	69
Foster v. Wilmer	137	H	
Fowler, Edger v.	19		
Fox v. Black	135	Hadley v. Clarke	80
Fraser, Cocking v.	90-105	Hall v. Mollineux	13-43
Freeland v. Glover	130	Hamilton v. Mendes	67-115
French, Robertson v.	32	Hancel, Havelock v.	83
Fry, Page v.	53	Harding v. Carter	21
G		Harrison v. Miller	7
		Hartley, De Hahn v.	38
		Havelock v. Hancel	83
Gamba v. Le Mesurier	159	Havelock v. Rockwood	61-77
Gardiner v. Crosedale	51		
Garrels v. Kensington	45-46	Haworth, Beatson v.	138
Garret, Goddard v.	144	Hayward v. Rodgers	142
Geyer v. Aguilar	45-75	Henchman v. Offley	12
Gilbert, Gregson v.	69	Henderson, Maans v.	18
Gilson, Bell v.	12	Henrickson v. Marget-son	9-152
Gladstone, Bolton v.	46-75	Hewitt, Vandyck v.	169
Gladstone, Sharp v.	119	Hibbert v. Carter	59
Gleen, Soame v.	186	Hill v. Patten	36
Glover v. Black	7-148	Hill v. Hollister	49
Glover, Willes v.	128	Hill v. Secretan	9
Glover, Hodgson v.	8	Hodson, Booth v.	6
Glover, Freeland v.	130	Hodgson, Tatham v.	70
Goddard v. Garret	144	Hodgson v. Glover	8
Godin v. Lond. Ass.	8-65	Hollingworth, Law v.	143
Gonsales, Bond v.	136	Hogg v. Horner	168
Gordon v. Morley	40-136	Hollister, Hill v.	49
Gordon v. Secretan	63	Hopkins, Salvador v.	27
Goss v. Withers	71-115-144	Hore v. Whitmore	39
Guyon, Townsend v.	135	Horner, Hogg v.	168
Graham, Bates v.	10	Horncastle, Wolff v.	53
Grant, Vezian v.	39	Horncastle v. Stuart	33
Grant v. Parkinson	151	Hughes, Le Cras v.	155
Greaves, Sullivan v.	5	Hunter, Ross v.	84
Gregory v. Christie	28	Hunter, Crawford v.	12

CASES CITED.

xi

Hunter, Farquharson v. *	28	L	
Hurrell, Sharpley v.	184		
Hurry v. Roy. Ex. Ass.		Laird v. Robertson	138
	15-30	Langdale v. Mason	218
		Lascelles, Smith v.	21-58
I		Lawrence v. Sydebotham	139
		Lavabre v. Watter	27-137
Inglis, Kensington v.	34	Lavabre v. Wilson	27-125
		Law v. Hollingworth	143
J		Le Cras v. Hughes	155
		Leeds, Duke of, Pugh v.	211
James, Salvin v.	230	Lees v. Smith	6
Jeffrey v. Legendra	40	Legendra, Jeffrey v.	40
Johnson v. Broderick	82	Legg, Farmer v.	59
Johnson, Sallouci v.	79	Leigh v. Mather	26
Johnson v. Sheddon	103	Le Mesurier, Flint v.	152
Johnston v. Sutton	157	Le Mesurier, Gamba v.	159
Jones v. Schmoll	30	Le Mesurier, Kelner v.	32-172
Joy v. Kent	185	Le Mesurier v. Vaughan	
Joyce v. Williamson	190		12-42
		Le Pyre v. Farr	144
K		Lever v. Fletcher	158
		Lewis v. Rucker	150-155
Kainis v. Knightly	57	Liotard, Cox v.	208
Kelner v. Le Mesurier		Lilly v. Ewer	40
	32-172	Littledale v. Dixon	127
Kenoway, Noble v.	15-29	Lockyer v. Offley	23-83
Kensington, Burnett v.		London Ass. Co. Barrass v.	26
	90-107	———— Cantillon v.	89-105
Kensington, Garrels v.	45-46	———— De Ghetoff v.	48
Kensington v. Inglis	34	———— Drinkwater v.	217
Kensington, Nesbitt v.		———— Godin v.	8-65
	34-91	———— Motteux v.	10-136
Kent v. Bird	155	———— Rucker v.	16
Kent, Joy v.	185	Long v. Allen	171
Kewley v. Ryan v.	12	Loraine v. Thomlinson	170
King, Carey v.	59	Lowry v. Bourdieu	156
Kinnaird, Aveson v.	215	Lubbock v. Potts	159
Knight v. Cambridge		Lucena, Crauford v.	53
	51-83-87	Ludlow, Depaiba v.	144
Knightly, Kainis v.	57	Lushington, Nesbitt v.	30-107
Kulen v. Vigne	59	Lynch v. Dalzell	223

CASES CITED.

xiii

Pawson v. Watson	id.	Routledge v. Burrell	221
Perchard v. Whitmore	52	Rowcroft v. Earle	87
Peters v. Milligan	101	Rowcroft, Thompson v.	81-117
Phyn v. Roy. Ex. Ass.	88-139	Royal Ex. Ass. Ander-	
Company	42	son v.	118
Pitcher, Anderson v.	124	————— Baring v.	44-75
Planche v. Fletcher	11	————— Hurry v.	15-30
Play v. Edie	133	————— Phyn v.	88-139
Plantamour v. Staples	152	————— Rucker v.	30
Pole, Fitzgerald v.	44	————— Taylor v.	59
Pollard v. Bell	29	Rucker, Berens v.	73
Poole, Eden v.	30	Rucker, Lewis v.	150-155
Poole, Fletcher v.	62	Rucker v. Lon. Ass. Co.	16
Porter, Senat v.	9-158	Rucker v. Royal Ex. Ass.	30
Potts v. Bell	159	Russell v. Boehm	57
Potts, Lubbock v.	100	Ryan, Kewly v.	12
Presgrave, Brickley v.	61		
Price v. Bell	211		
Pugh v. Duke of Leeds		S	

R

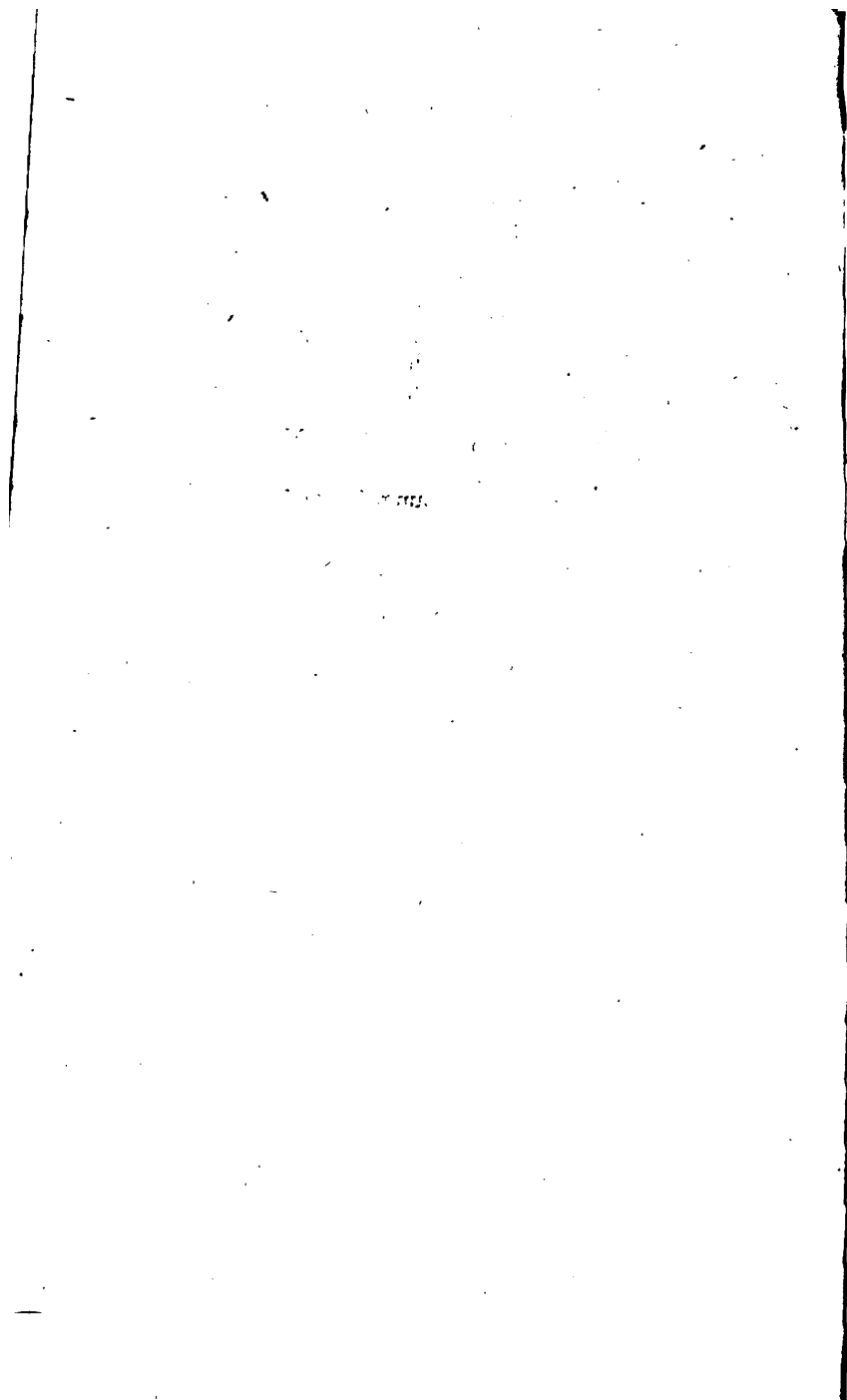
		Sadler v. Badcock	228
		St. Barbe, Cazalet v.	115
Randall v. Cockran	113	Salluci v. Johnson	79
Read, Newby v.	69	Salvador v. Hopkins	27
Rex v. Easterby	129	Salvin v. James	230
Rich v. Parker	43	Schmoll, Jones v.	30
Ripley, Backhouse v.	96	Scott v. Thompson	139
Robert v. Tremayne	185	Secretan, Christie v.	61-75
Robertson v. Ewer	29	Secretan, Gordon v.	63
Robertson v. French	32	Secretan, Hill v.	9
Robertson, Laird v.	138	Seller v. M'Vicar	31
Rockwood, Havelock v.	61-77	Selwin, Chitty v.	25-49
		Senat v. Porter	62
Rodgers, Aguilar v.	167	Sharp v. Gladstone	119
Rodgers, Hayward v.	142	Sharpley v. Hurrell	184
Roebuck, Mills v.	id.	Shaw v. Felton	71
Rogers, M'Carthy v.	20	Sheddon, Johnson v.	103
Rogers, Page v.	52	Shepherd v. Wright	100
Rohl v. Parr	70	Shirley v. Wilkinson	125
Ross v. Hunter	84	Simon, Stackpole v.	212
Rotch v. Edie	80	Skurray, Mason v.	90-105
Rothwell v. Cooke	43	Smith v. Cologan	22

Smith v. Lascelles	21-58	Thompson, Nantes v.	52
Smith, Lees v.	6	Thompson, Page v.	91-106
Smith, Wilson v.	89-105-106	Thompson v. Rowcroft	18-117
Snow, Stevenson v.	169	Thompson, Scott v.	139
Soame v. Green	186	Thompson v. Taylor	25
Sparrow v. Carruthers	16	Thompson, Webb v.	42
Stackpole v. Simons	212	Thompson v. Buchanan	130
Staniforth, Tarleton v.	219	Tidswell v. Angerstein	204
Stamma v. Brokin	83	Tonge v. Watts	24
Staples, Plantamour v.	133	Towers, Bristow v.	9
Steadman, Williams v.	192	Townson v. Guyon	135
Stephens, De Frise v.	25	Tremayne, Roberts v.	185
Stevenson v. Snow	169	Turner, Dandy v.	186
Stewart v. Dunlop	125	Tyric v. Fletcher	169
Stoddart, Delaney v.	136-222		
Strong, v. Natally	16	V	
Suart, Horncastle v.	33		
Sullivan v. Greaves	5	Vallejo v. Wheeler	83
Sumner v. Green	176	Vander Deyl, Myers v.	96
Sutton, Johnson v.	157	Vandyck v. Whitmore	158
Swanson, De Vignier v.	12	Vandyck v. Hewett	169
Sydebotham, Laurence v.	139	Vaughan, Le Mesurier v.	12-42
Syers v. Budge	26	Vaughan, M'Andrews v.	90
Symond v. Boydell	167	Vaughan, Whitehead v.	54
		Vezian v. Grant	39
T		Victoria v. Cleeve	41
		Vigne, Kulen v.	59
Tarleton v. Staniforth	219		
Tatham v. Hodgson	70	W	
Taylor v. Roy. E. Ass.			
. Company	59	Wallace v. Tellfair	22
Taylor, Thompson v.	25	Walpole v. Ever	191
Tellfair, Wallace v.	22	Walter, Lavabre v.	27-137
Thellusson v. Bewick	105	Walter, Mayne v.	124
Thellusson v. Ferguson	39-137	Walters, Newman v.	111
Thellusson v. Fletcher	107-149	Waples v. Eames	23
Thomlinson, Lorraine v.	170	Watson, Pawson v.	38
Thompson, Beale v.	82	Watts, Tonge v.	24
Thompson v. Charnock	49	Way v. Modigliani	137
		Webb v. Thompson	42
		Webster v. De Tastet	8

GASES CITED.

xv

Weston v. Wildy	191	Wilson, La ^v abre v.	27-125
Wheeler, Vallejo v.	83	Wilson v. Marryat	157
Whitmore, Brough v.	26	Wilson v. Smith	89-105-106
Whitmore, Hore v.	39	Withers, Goss v.	71-115-144
Whitmore, Nesbitt v.	171	Wolff v. Horncastle	53
Whitmore, Perchard v.	52	Wolleford, Barton v.	189
Whitmore v. Vandyck	158	Wood, Worsley v.	221
Whitehead v. Vaughan	54	Wooldridge v. Boydell	137
Wildy, Weston v.	191	Worsley v. Wood	221
Wilkinson, Shirley v.	125	Wright v. Barnard	62
Willes v. Glover	128	Wright, Shepherd v.	100
Williams v. Steadman	192		
Williamson, Joyce v.	190		Y
Wilmer, Foster v.	137		
Wilson, Elliot v.	135-138	Young, Green v.	79-137



INTRODUCTION.

THE art of navigation no sooner became known than commerce introduced a new specie of correspondence among men. It is from this æra that we must date the commencement of such an intercourse between nations, as deserves the appellation of commerce. Remote countries could not convey their commodities by land to those places, where, on account of their rarity, they are desired and become valuable. It is to navigation that men are indebted for the power of transporting the superfluous stock of one part of the earth to supply the wants of another.

Trade proved a great source of discovery and improvement; it opened unknown seas, it penetrated into new regions, and contributed more than any other cause to bring men acquainted with the situation, the nature, and the commodities of the different parts of the globe. But still many centuries elapsed ere navigation and commerce advanced beyond the infancy of their improvement in the ancient world.

The first elements of navigation were unknown to the ancients, though they were not ignorant of the property of the magnet; yet, its important and amazing virtue of pointing to the poles had entirely escaped their observation; destitute of this faithful guide, their only method of regulating their course was by observing the sun and stars, their navigation was of consequence timid and uncertain. An incredible length of time was occupied in the performance of voyages which are now accomplished in a few weeks. Even in the mildest climates, and in seas the least tempestuous, the ancients durst only venture out of their harbours in summer.

The first who surmounted these difficulties were the Egyptians, who opened a trade from the Red Sea to the western coast of India. The commodities brought from India were conveyed from the Arabian Gulph to the Banks of the Nile, and from thence down that River to the Mediterranean. Their policy however(*a*) long militated against a liberal system of commerce, and it was only in the decline of their power that they opened their ports to foreigners.

The Phœnicians were of a very opposite character, circumscribed in territory, and undistinguished by unsocial peculiarities in their manners and institutions, they looked to commerce as the only source from which they could derive opulence or power, and the trade of Sidon and Tyre accordingly became more extensive and enterprising than any state in the ancient world ; the genius, policy, and laws of the Phœnicians were entirely commercial.— They were a nation of merchants who aimed at the empire of the sea, and actually possessed it. Their ships not only visited every port of the Mediterranean, but they were the first(*b*) who ventured beyond the ancient boundaries of navigation, and passing the Straits of Gades visited the western coasts of Spain and Africa.

These transmitted their commercial spirit with facility to the Carthaginians. They applied to trade and commercial affairs with no less ardour, ingenuity, and success than their parent state. Carthage early rivalled, and soon surpassed Tyre in power and opulence ; but they extended their navigation chiefly towards the west and north(*c*) visiting not only all the coasts of Spain, but those of Gaul ; penetrating to Britain, they at length discovered the fortunate islands now known by the name of the Canaries. The voyages of Hanno and Himilco(*d*) as well as that of Eudoxus (*e*) of Cyzicus, excite our surprise, but the authorities are too doubtful to dwell on a summary account of this nature.

[*a*] *Diod. Sicul. lib. 1. p. 78. Strabo. lib. xvii. p. 1142.*

[*b*] *Strabon. Geogr. Edit. Casaub. lib. xvi. p. 1128.*

[*c*] *Plinii Nat. His. lib. vi. c. 37.* [*d*] *Herodot. lib. iv. c. 42.*

[*e*] *Plinii Nat. Hist. lib. ii. c. 67.*

The navigation of the Greeks and Romans, though less splendid, is better ascertained than that of the Phœnicians and Carthaginians. Though Greece is almost encompassed by the sea, which forms many spacious bays and commodious harbours, and is surrounded by innumerable fertile islands, yet it was long before this art attained any degree of perfection among them. The object of their voyages was piracy rather than commerce, and were so inconsiderable that the expedition of the Argonauts appeared such an amazing effort of courage and skill as entitled its conductors to the rank of demi-gods, and their vessels to be placed among the heavenly constellations. Even at a later period, when the Greeks engaged in their famous enterprise against Troy, their improvement in nautical matters had hardly advanced beyond its rudest state. Unacquainted with the use of iron in the heroic ages, their progress in the mechanical arts long languished. Their vessels were of inconsiderable burthen, mostly without decks, and had only one mast, which they erected and took down at pleasure. They were strangers to the use of anchors; their operations in sailing were clumsy and unskilful. Their observations of the stars were inaccurate and fallacious; and when they had finished a voyage they drew their paltry barks ashore, where they remained on dry land until the returning season for sea approached.

As the Greeks advanced in improvement, however, they applied to commerce with such ardour and success, that they were considered in the ancient world as maritime powers of the first rank. Even then their progress in the science of navigation was so slow, that their victories over the Persians are to be ascribed to their courage rather than their skill, and were achieved principally (*f*) by small vessels without decks, the crews of which rushed forward with impetuous valour, but little art, to board those of the enemy.

The commerce of the maritime states of Greece, after all, scarcely extended beyond the limits of the Mediterranean Sea; their chief intercourse was with the colonies of their countrymen planted in the lesser Asia, in Italy and Sicily. Sometimes visiting Egypt, Gaul, and Thrace, or passing through the Hellespont,

they traded with the countries situated around the Euxine Sea. Their ignorance, however, of the countries which lay within the narrow precincts of their navigation was obvious in their naval expedition against Xerxes at Egina,^(g) when they deemed it unadvisable to sail to Samos on account of its supposed distance. Their knowledge of the rest of the globe was founded on conjecture, or derived from the information of very few persons, whose curiosity or love of science had prompted them to travel by land into Lesser Asia, or by sea into Egypt.

The revolution in commerce brought about by the force of the genius of Alexander the Great, considerably enlarged the sphere of navigation among the Greeks. The formidable opposition he met with from Tyre, probably gave him an opportunity of observing the vast resources of a maritime power, and conveyed to him some idea of the immense wealth they derived from their commerce, especially that with the East Indies, and induced him, after his conquest of Egypt, to build that city which was to be the centre of commerce as well as the seat of dominion.

The situation of Alexandria was chosen with such discernment, that^(h) it soon became the chief commercial city in the world, amidst all the successive revolutions in those countries, from the reign of the Ptolemies to the discovery of the navigation by the Cape of Good Hope.

The progress of the Romans in navigation and discovery was still more inconsiderable than that of the Greeks. Their military education, and the spirit of their laws, concurred in estranging them from commerce and naval affairs. The necessity of opposing a formidable rival, not the desire of extending trade, first prompted them to aim at maritime power. Its advantages soon became apparent, though after they had rendered themselves masters of the sea, they still considered the naval service as a subordinate station, and never imbibed the commercial spirit of the conquered nations. They abandoned the mercantile arts, commerce, and navigation, to slaves, to freedmen, to provincials, and to citizens of the lowest

[g] Herodot. lib. viii. c. 132.

[h] Strabon. Geogr. lib. xvii. p. 1143, 1149.

class. Yet the spirit of the Roman government, no less intelligent than active, gave such additional security to commerce, as animated it with new vigour. The union among nations was never so entire, nor the intercourse so perfect, as within the bounds of this vast empire. Commerce under their dominion, was not obstructed by the jealousy of naval states, interrupted by frequent hostilities, or limited by partial restrictions. One superintending power moved and regulated the industry of mankind, and enjoyed the fruits of their joint efforts. By frequenting the Indian continent, navigators became acquainted with the periodical course of the winds.⁽ⁱ⁾ Encouraged by observing this, they stretched boldly across the ocean. The uniform direction of the wind supplying the place of the compass, and rendering the guidance of the stars the less necessary; they reached the western shore of the Indian continent with safety, and with equal facility returned with the eastern monsoon.

The discovery of this new method of sailing to India, was the most considerable improvement in navigation made during the continuance of the Roman power. But in ancient times the knowledge of countries was acquired more by land than by sea; and the Romans, from their peculiar disinclination to naval affairs, may be said to have^(k) neglected totally the latter, though a more easy and expeditious method of discovery. They seem however to have made a more accurate survey of the countries contiguous to the Euxine and Caspian seas, and to have carried on a more extensive trade than that of the Greeks with the opulent and commercial nations, then seated around the Euxine sea.

The invasion of the Roman empire by the hordes of Barbarians, soon changed the face of affairs; commerce became languid and feeble; nor did any important revolution happen in trade, excepting that Constantinople, by its advantageous situation, and the encouragement of the eastern emperors became a commercial city of the first note. In that city the knowledge of the ancient arts and discoveries was preserved, a taste for the productions of foreign countries prevailed, and commerce continued to flourish there, when it was almost extinct in every other part of Europe. When Egypt

[G] Plin. Hist. Nat. lib. vi. c. 23.

[A] Strab. lib. i. p. 26.

was torn from the Roman empire by the Arabians, the industry of the Greeks discovered a new channel by which the productions of India could be conveyed to Constantinople. They were carried up the Indus, as far as that great river is navigable; thence they were transported by land to the banks of the river Oxus, and proceeded down its stream to the Caspian sea, where vessels from (l) Constantinople waited their arrival. This extraordinary and tedious mode of conveyance merits attention, as it affords a specimen of the ardour and ingenuity with which the inhabitants of Constantinople carried on commerce, and demonstrates their extensive knowledge of remote countries, at a period when ignorance reigned in the rest of Europe.

It is not the object of the compiler to trace the wonderful progress of the Arabians, in those sciences on which navigation is founded; suffice it to say, they employed experiments and operations which Europe, in more enlightened times, has been proud to adopt and to imitate.—Commerce with them flourished to a great degree and to an amazing extent, but too remote to reach, to benefit, or to enlighten Europe at that period. The knowledge of their discoveries, however, was reserved for ages, capable of comprehending and of perfecting them.

Italy, from various causes not necessary to enumerate, first began to revive after the calamities and desolation brought upon the western provinces of the Roman empire, by its barbarous conquerors. A relish for the functions and comforts of civil life, necessarily introduced social order. Chivalry and arms gave place to commerce and arts, and Europe awakened from its torpid (m) and inactive state. Constantinople became the chief mart of the Italians. There they obtained great mercantile privileges, and were supplied both with the precious commodities of the East, and those which the ingenuity that still subsisted among the Greeks, enabled them to manufacture and vend to their neighbours. The industry of the Italians discovered other methods of procuring rare and precious commodities; they sometimes purchased them in Aleppo, Tripoli, and other parts of Syria, to which they were brought by a rout not

[l] Ramusio, vol. i. p. 372.

[m] Robertson's Hist. Charles V. vol. i. p. 33.

unknown to the ancients. They were conveyed from India by sea up the Persian Gulph, and ascending the Euphrates and Tigris as far as Bagdad, were carried by land across the desert to Palmyra, and from thence to the towns on the Mediterranean.

At length the sultans of Egypt, having renewed the commerce with India, in its ancient channel, by the Arabian Gulph, the Italian merchants, notwithstanding the violent antipathy of the Mahometans, repaired to Alexandria, and established a lucrative trade in that port. From that period the commercial spirit of Italy became active and enterprising. Venice, Genoa and Pisa rose from inconsiderable beginnings to be populous and wealthy cities. Their naval power increased; their vessels frequented not only all the ports in the Mediterranean, but venturing sometimes beyond the Straits, visited the maritime towns of Spain, France, the Low Countries, and England, and began to communicate some ideas of manufactures and arts, which were then unknown beyond the precincts of Italy.

While Italy thus advanced in the career of improvement, the martial spirit of the Europeans, heightened and influenced by religious zeal, prompted them to deliver the Holy Land from the dominion of the Infidels. The Genoese, the Pisans and Venetians furnished the transports which carried many of them thither. They supplied them with military stores and provisions; and besides the immense sums they received on this account, they obtained great commercial privileges and establishments in Palestine, which presently diffused such a degree of wealth and spirit in Europe as prepared her for future discoveries. By their expeditions into Asia, the European nations became well acquainted with remote regions, and the manners, arts and accommodations of people more polished than themselves. The Europeans became sensible of the utility of commerce and navigation, they perceived the immense advantages likely to be obtained from their introduction, and the facilities afforded to maritime adventurers by the first rude outline of marine insurance, which the Rhodian(n) laws pointed out for their adoption.

[n] Schomberg's Observations on the Rhodian Laws.

While the spirit of commerce was extending itself over Europe, the fortunate discovery of the mariner's compass was happily made. Navigators soon found that by the wonderful property of the magnet, which communicates such virtue to a needle as to point towards the poles of the earth, they might rely on this new and wonderful guide, and boldly venture into the ocean in all seasons, and under the most cloudy sky, with a security and precision till then unknown. The compass may be said to have opened to man the dominion of the sea. A citizen of Amalfi was the author of this great discovery, about the year 1302. The commercial jealousy of the Italians, however, laboured to conceal the happy discovery of their countryman from other nations. But its wonderful properties could not long remain concealed from the commercial states of Europe, and nothing contributed more to diffuse a general knowledge of its advantages than the crusades.

The crusades, about the close of the eleventh century, opened a vast communication between Europe and the East. Constantinople, the capital of the Greek or eastern empire, had escaped the ravages of the northern barbarians, who had overthrown that of the West. It was still a great and commercial city, abounding in all the elegancies of polished life, in the full enjoyment of those luxuries which refinement and extended commerce could impart, and became the chief rendezvous for the Christian armies in their progress to and from Palestine. The leaders of those armies could not behold the opulence and splendour of the Greeks with indifference; they presently perceived that they owed all to their remote and extensive commerce, and they accordingly brought back with them a taste for the refinement, arts and luxuries of the East. Thus, though the immediate object of the crusades, which was conquest, not commerce, failed, yet the commercial effects they produced in these western parts were beneficial and permanent.

The English, in particular, were considerable gainers by the crusades; their enterprising monarch, Richard I. is supposed to have compiled the celebrated laws of Oleron (o) from the Rhodian maritime code, although the progress of English commerce was not answerable to so auspicious a beginning, for in the reign of Ed-

[o] Selden *de dominio maris*, c. 24.

ward III. upwards of a century afterwards, commerce(*p*) and industry were at a low ebb. But that monarch, struck with the flourishing state of the northern provinces of Europe, and perceiving the true cause of their prosperity, endeavoured to excite a spirit among his subjects, who seemed blind to the advantages of their situation, and ignorant of those sources, from whence they(*q*) might derive wealth and opulence. So far were they lulled by ignorance and indolence, that they did not even attempt those manufactures, the materials of which they themselves supplied to foreigners.

But notwithstanding the endeavours of Edward, and the many wise establishments proposed and encouraged by him,*(r)* it was not till the reign of Elizabeth that the English began to discover their true interests, and the arts by which they were to obtain that pre-eminence and rank, which they now hold among commercial nations. This slow progress of commerce in this country, may be accounted for on various grounds. During the Saxon heptarchy, England was split into many kingdoms, perpetually at variance with each other; it was exposed to the fierce incursions of the northern pirates, sunk in barbarity and ignorance, and consequently in no condition to cultivate commerce, or pursue any system of wise and useful policy. To this succeeded the Norman conquest, and all the consequences of a feudal government, military in its nature, hostile to commerce, to the arts, and to the refinement of a liberal and civilized people. Scarce had the nation recovered from the shock occasioned by this revolution, when it was engaged in supporting its monarch's pretensions to the French crown, and it long continued to waste its vigour and wealth in wild endeavours to conquer that country. To this we may add the destructive civil wars between the houses of York and Lancaster, which long deluged the kingdom with blood, and to which a period was at last happily put by the union of their several titles to the crown, in the person of Henry VIII. The reformation then took place under that monarch, and it was not till the reign of Elizabeth, that the feuds and dissensions, which such an important event was likely to occasion, began to subside. During her long reign, and her wise and

[*p*] Hume's Hist. of England, oct. edit. vol.ii. p 494.

[*q*] Robertson's View of Society, &c.

[*r*] Park's Introd. xxxvi. 5th edit.

prudent administration of government, commerce began to rear its head, and found shelter and protection from the managers of public affairs.

No sooner, however, did England become acquainted with the nature of trade and manufactures, than she immediately discovered those advantages which rendered her capable of carrying both to an extent superior to other nations, as commerce had at all times flourished most either in islands or the borders of the sea, or of navigable rivers ; hence trade and manufactures began to increase, though by slow degrees, till by the discovery of America, and of a passage to the East Indies by the Cape of Good Hope, the ancient channels of commerce, and the projects and views of commercial men became completely changed. The Mediterranean sea, to which the commerce of Europe had till then been chiefly confined, gave place in importance to the open sea ; and the making conquests, or establishing colonies in the newly-discovered countries, drew the minds of speculating and enterprising men to objects, which at length connected commerce with projects of sufficient splendor to attract the attention of the first monarchs and states in Europe.

Spain and Portugal had acquired such treasures from their conquests in the new world, that it was impossible for any monarch who had the power, to withstand the temptation of making efforts to participate in such mines of wealth. Fortunately for England, it never discovered any mines of gold or silver, which not only tend to gratify avarice, but banish industry. The possessions that fell to the lot of this country, were all of such a nature as required industry, and the establishment of manufactures and commerce, in order to reap from them those advantages, with a view to which they had been sought after.

In addition to the enlivening influence of royal attention which Edward III. had bestowed on commerce and manufactures, two circumstances occurred in the next and succeeding century, which tended greatly to the introduction and perfection of the latter in this kingdom. The first was the **tyranny** exercised by the duke of Alva over the protestant Walloons, who, in seeking a place of refuge, where they might worship their Maker agreeably

to the tenets of their faith, and follow their industrious vocations in safety, brought over with them into England(s) many of those arts which greatly tended to the increase of wealth in this country. The second was the revocation of the edict of Nantz, by Louis XIV. by which the protestants had been protected throughout the whole of his extensive dominions. On this occasion, another influx of industrious manufacturers arrived and settled in this country, which felt in a most astonishing manner the beneficial effects that resulted from a measure in itself unjust and impolitic.

The woollen manufacture was so little known in this country in the fourteenth century, that Edward III. wrote a letter with his own hand, to John Kemp, a woollen manufacturer in Flanders, offering to take him, and his servants, apprentices, goods and chattels under his(t) royal protection, and promising the same to all others of his occupation, as well as to all dyers and fullers who should incline to come and settle in England.(u) No less than seventy Walloon families in the woollen manufacture, availed themselves of this politic offer, and came over to settle here.

Only four years after the introduction of the first woollen manufacturers from Flanders, an act of parliament(x) was passed to prevent the exportation of wool, and holding forth protection and encouragement to all cloth workers who should come from foreign parts.

And by a preceding act,(y) all persons other than the king, queen, and royal family were prohibited from wearing any cloth that was not manufactured within the realm. The importation of foreign cloth was also forbidden on pain of forfeiture and other punishment. But so jealous were the weavers of our own coarse cloths, of the introduction of better from abroad, that in 1344, a mob in London, principally composed of and instigated by them, insulted and maltreated the foreign weavers, so that they could not carry on their business with security; whereupon warrants were issued by the king, directed to the mayor and sheriffs, to imprison the ringleaders in the jail of Newgate.

[s] Meterani Hist. Belgica, lib. 3.

[t] Rymer's Fœdera, p. 496.

[x] The 11th of Ed. 3. c. 2.

[u] A. D. 1337.

[y] 11 E. 3. c. 1.

Such however, was the comparative insignificance of our exports even so late as 1534, that the whole from every part of England, did not exceed 900,000*l.* of the present value of our money, yet the balance of trade in our favour at that period, exceeded 700,000*l.* as appears by a record in the Exchequer.

The balance arising principally from the exportation of wool, and woofels, lead, tin, and leather, was very considerable in proportion to the whole amount of the trade, and produced a duty of customs on exports to the amount of 246,000*l.* according to the present value of money, while the duty on imports amounted to little more than 1700*l.* From which we may plainly discover how little the elements of trade and commerce were understood in this kingdom at that period.

A society of merchants, under the denomination of the brotherhood of St. Thomas-a-Becket, branched out of that of the merchants adventurers at that time, which considerably extended the exports as well as imports, obtaining in the year 1358 ample privileges from Lewis count of Flanders, for fixing their staple at Bruges, who greatly increased the manufacture and exportation of woollen cloth from England.(z)

[z] From the 11th of Edward the 3d, to the 43d of Elizabeth, the following Acts passed for improving and regulating the woollen manufactures of England, admeasurement of cloths, &c. viz.

11 Edw. 3. c. 3, 5.	3 Hen. 7. c. 11.
18 c. 3.	4 c. 8, 11.
31 c. 8.	3 Hen. 8. c. 6, 7.
38 c. 6.	6 c. 9.
50 c. 7.	22 c. 1.
3 Ric. 2. c. 2.	24 c. 2.
14 c. 4.	27 c. 12, 13.
4 Hen. 4. c. 6, 24.	37 c. 15.
7 c. 10.	3&4 Ed. 6 c. 2.
13 c. 4.	5 & 6 c. 6, 8.
2 Hen. 6. c. 5.	4 & 5 P. & M. c. 5.
8 c. 22.	8 Eliz. c. 6.
14 c. 2.	14 c. 10.
18 c. 15, 16.	23 c. 9.
3 Edw. 4 c. 1.	39 c. 11, 14, 20.
4 c. 1.	43 c. 10.
7 c. 3.	

About the same period, the most favourable regulations for the promotion of the herring fishery and fair at Yarmouth, were made ; and to the encouragement which Edward III. afforded the fisheries in general, may be ascribed the present naval power, and maritime pre-eminence of this kingdom.

Commerce and navigation, however, owe much to the Hanseatic league, which flourished about this time in the north of Europe. This extraordinary commercial confederacy arose about the close of the eleventh century, and comprehended no less than seventy-two cities in different parts of Europe within the league ; Bremen, Lübeck, and Amsterdam were the first that associated, solely with a view to defend their navigation and commerce against the northern pirates and sea robbers. The towns and cities bordering on the Baltic, perceiving its advantages, joined the league, and some of the principal trading towns and cities of France, Spain, Italy, and even London itself, entered into the league ; the power and resources of which enabled it to wage successful war with Waldemar III king of Denmark, whom they drove from his throne, after reducing the castle of Copenhagen, and making the chief of his nobility prisoners of war.(a)

This commercial phenomenon enjoyed its power and resources for more than seventy years, but was at length humbled and reduced by the Dutch, who could not brook a rival, although they were members of the association. But the Hanseatic league is not wholly dissolved at this day, as the cities of Lübeck, Hamburg, and Bremen retain sufficient marks of that splendour and dignity with which this confederacy was anciently distinguished.

The facilitating remittances by bills of exchange was another great commercial improvement of the age we speak of, and was so little known or practised in England, that early in the fifteenth century Henry IV. granted leave to Philip d'Albertis a rich Lombard merchant, then residing in London, to give a bill of exchange (*literam cambii*) on his partners abroad, for two thousand five hundred marks sterling, to the bishop of Bath and Wells, or his attorneys, on con-

[a] Werdinhagen's Hist. of the Hanseatic League.

sideration that neither the said gold received for the bill of exchange, nor any other gold or silver, either in coin or bullion, be transported beyond sea under colour of that licence, upon pain of forfeiting all the money so transported.

Commerce, as well as arts, however, sometimes encouraged, at others oppressed by our monarchs, advanced but slowly in England; and during the contentions between the houses of York and Lancaster, dwindled almost into nothing. Some regulations were however, made at intervals, even in those turbulent times, for the prevention of frauds in the manufacturing of cloths; and other matters of commercial importance were occasionally adverted to by the legislature, which evinced some knowledge of the elements of trade and commerce.

A solid foundation was certainly laid for the improvement of our manufacturers at a very early period; but without foreign commerce manufactures were not likely to be carried to any great degree of perfection. By the discovery of America, new channels for commerce presented themselves to our enterprising merchants, and the intercourse between the old and the new world, soon enabled England to avail herself of her great commercial advantages, and though one of the last nations in Europe to perceive them, she has since made ample amends for her long continued indolence and inactivity.

The advantages of commerce began to be felt and understood, when Elizabeth ascended the throne, who, treading in the steps of her sagacious predecessor, Edward III. no sooner began to reign, than it principally engaged her attention, and by a single charter, she confirmed all the former charters which had been granted by the kings, her predecessors, to the merchant adventurers of England. The true principles of commerce were promulgated and put in practice in the very beginning of her reign; and various acts were passed laying a solid foundation for that degree of commercial prosperity which has astonished the world; while we owe the perfection of our manufactures to the causes already enumerated, which compelled thousands of the most skilful manufacturers of

France and Flanders to seek an asylum in this kingdom, who, diffusing their knowledge of arts and manufactures among their protectors, made ample amends for the protection afforded them.

But to our system of navigation laws, are we principally (b) indebted for our commercial pre-eminence. These laws are penned with great clearness, and are happily exempt from those ambiguities which, in some degree, cloud the construction of other laws, framed by persons of the best learning and experience. The origin of our navigation code may, however, be traced much higher than the reign of Charles the second; for the first provision that can be classed under the denomination of a navigation act, was made in the latter part of the reign of Edward III. (c) The next material law relative thereto was framed in the reign of Henry VIII. (d) But a law of Elizabeth's reign in 1563, intituled, *An act touching politic Constitutions for the Maintenance of the navy &c.* (e), may be considered as the grand outline of the system matured by the wisdom and experience of after ages. By this law, herrings, and other fish caught on our coasts, are permitted to be exported duty free. No foreign ships are to be allowed to carry goods coastwise from one port to another, and wines and wood were only permitted to be imported from France in English ships.

It was impossible to devise better laws for encouraging fisheries and manufactures, than those framed in the reigns of Edward III and Elizabeth; although such restrictions may be considered prejudicial in a more advanced state of commerce, they nevertheless formed the foundation for raising that stupendous superstructure, which has rendered the British capital the emporium of the world, and elevated her monarch to the most exalted sovereignty of the seas!

Monopolies and exclusive privileges, which existed from the earliest times, originated in a desire of the sovereign to participate in the profits of trade. But it was reserved for the auspicious reign

[b] 12 Car. 2. c. 18. 7 & 8 Will. 3. c. 22. 26 Geo. 3. c. 60. 27 Geo. 3. c. 19. 34 Geo. 3. c. 42, 68. 35. Geo. 3. c. 58. 37 Geo. 3. c. 63.

[c] 42 Ed. 3. c. 8. [d] 23 Hen. 8. c. 7. [e] 5 Eliz. c. 5.

of Elizabeth to grant patents on the principle of public utility only : a principle that has never been lost sight of by the ablest of her successors. The attention of Elizabeth was not confined to internal regulations alone ; beacons and sea-marks for the safety of navigation were judiciously placed along our coasts, to direct the adventurous mariner. Nor was her resolute opposition to the Hanseatic encroachments less praiseworthy. The German factors at the Steel-yard had, till her brother's reign, enjoyed privileges and exemptions from duties, superior to the English merchants, on exporting our cloths. These factors traded principally to Antwerp and Hamburg, and generally set what price they pleased on exports as well as imports, and having the command of all the markets by trading on a joint stock, they rendered all competition impracticable. These grievances led to an investigation, when it appeared that while the whole body of English merchants exported only eleven hundred cloths, the German merchants of the Steel-yard alone had exported *forty-four thousand* in the preceding year. Their immunities were therefore abolished, and such were the beneficial effects of this salutary measure, that the very next year the English merchants exported *forty-thousand cloths to Flanders alone*. Elizabeth understood the elements of commerce too well to permit a privileged society (f) of foreign merchants to deprive her own subjects of the benefit of the export trade. That her exertions were crowned with success, we need only advert to the circumstance of the customs having been farmed at the commencement of her reign, by Sir Thomas Smith, at fourteen thousand pounds, for which towards its close, he paid fifty thousand pounds per annum ; and such was the wisdom of her laws and regulations, that they infused a spirit of enterprise in her subjects, which produced wonderful effects. The passage to Archangel was discovered, and a very profitable trade opened with Russia, till then scarce known in this kingdom. The czar John Bazilowitz granted extraordinary privileges to the English throughout his dominions ; and an attempt was made to open a trade with India by the rivers Dwina, Wologda, and the Caspian sea, which, although tedious and expensive, would have had its advantages, had not the English navigators followed the route of the Portuguese round the Cape of Good Hope.

The Guinea company, established about the same period, diffused a degree of knowledge of the interior of Africa, till then scarce known in England; and the return of some English merchants from an expedition to India by way of Aleppo and Bagdad, down the river Tigris to Ormus in the Persian Gulph, and to Goa on the Malabar Coast, who had visited Agra, Lahore, Bengal, Pegu, and Malacca, in their progress, contributed to form more adequate ideas of the facility of opening a direct trade with that region of wealth, which was not a little aided by the communications of the Spanish prisoners, captured in the large East India carracks, by Sir Walter Raleigh, off the Azores, in 1593, one of which was of sixteen hundred tons burthen, carrying thirty-six brass guns, and seven hundred men, laden with silks, drugs, spices, calicoes, gold, pearls, ebony, and other precious commodities, of the value of one hundred and fifty thousand pounds sterling!

These rich captures inspired the people with such a degree of ardour for opening a direct trade with India, that an East India company was established in the year 1600, consisting of fifty pounds shares only, whose capital amounted to no more than *seventy-two thousand* pounds, with *five ships*, measuring only 1330 tons, altogether valued at twenty-seven thousand pounds, and navigated by 480 men.

Such was the origin of this commercial phenomenon! Such the incipient establishment of a company possessing at this moment an unlimited sovereignty over the hither peninsula of India, extending two thousand miles east and west, and nearly as many north and south, with a population of thirty millions of souls, and a revenue of fifteen million pounds sterling! All which was achieved by the civil and military servants of a company unversed in diplomatic forms, and still less skilled in the science of government, as taught and practised by the jus-publicists of Europe!

Every other branch of British commerce has kept pace with this extraordinary increase; our exports to the West Indies from Great Britain and Ireland, amounting in the last year to near six millions, while our imports from thence (including the conquered

colonies) exceeded seventeen millions sterling, employing in the transit of those valuable commodities no less than eight hundred and thirty-seven ships, containing two hundred thirty-six thousand five hundred and ten tons, and navigated by eighteen thousand seamen.(g)

But it is not the intention of the Compiler to enter into the detail of the various branches of our export and import trade. Suffice it to say, that the estimated value of British manufactures exported in 1806, exceeded the sum of forty millions, while our imports amounted to more than thirty millions, to which we may add upwards of ten millions of foreign goods, which were exported from this country, making an aggregate sum of more than eighty millions of property exported and imported into and from Great Britain in a single year,(h) affording employment to two millions two hundred thousand tons of merchants shipping, and upwards of 156,000 seamen,(i) protected by a navy of nine hundred ships of war !

To guard this vast and unparalleled commerce against every peril of the seas, and possibility of capture ; to screen those engaged therein, from the ordinary casualties attending a traffic of such extraordinary magnitude ; the ingenuity of man devised the salutary plan of insurance, which the wisdom of our tribunals have matured into a system of maritime jurisprudence, embracing its almost endless ramifications, affording protection to the *assurer*, and indemnity to the *assured* !

A complete system of jurisprudence, however, could not be suddenly erected ; but there is rather matter to excite our wonder that so much has been done in this respect(k) within the last forty years, than ground to complain that little has been effected. It is the boast of this age, that in it the great foundations of marine jurisprudence have been laid, by clearly developing the principles

[g] Documents laid before a meeting of the West India merchants and planters at the London Tavern, 26 February, 1807.

[h] Finance Report, 1807, p. 231. [i] Ibid. 233.

[k] Park's *Introd.* xlvii. 5th edit.

upon which policies of insurance are founded, and by happily applying those principles to particular cases. The improvements which have been made by the legislature from time to time, on the system of insurances, by many wise statutes and salutary restrictions, have, by the liberal and equitable construction of the learned judges of the courts both of law and equity, who adopted the true principles of commerce, in their decision of the many intricate cases which have been brought before them, added another pillar to that beautiful structure of rational jurisprudence, which has deservedly acquired the admiration of mankind.

A

COMPENDIUM
OF THE
LAW OF INSURANCE.

INSURANCE or assurance, according to Sir William Blackstone, *(a)* is a contract by which the insurer undertakes, in consideration of a premium equivalent to the hazard run, to indemnify the person insured against certain perils or losses, or against some particular event, as shall be specified in the policy or instrument of insurance, subscribed by the insurer or insurers.

The utility of this species of contract in a country so deeply engaged in commerce as Great Britain, is too obvious to render it necessary for the compiler to expatiate on the subject. The most distinguished writers have sufficiently enlarged on the great security which insurances give to private fortunes, by dividing amongst many that loss which would ruin an individual.

Savary *(b)* is of opinion that this custom originated with the Jews, when they were banished from France, A.D. 1182, who took that method to facilitate and

[a] 2 Comm. 458. [b] Dictionnaire du Commerce; tit. Assurance.

secure the removal of their effects; and that the Lombards shortly afterwards adopted, considerably improved, and ultimately matured the contrivance into a regular system; while other writers give the ancients the merit of the invention, ascribing it to Claudius Cæsar, from a passage in Suetonius; and some respectable authorities put in the Rhodians for a claim to the invention,^(c) and conceive that the law of insurance had obtained^(d) a place in most of the ancient codes of jurisprudence; be that as it may, its beneficial effects are manifest, and the excellent and improved state of our maritime code universally felt and admired.

Insurance has been many ages practised in this kingdom, and is supposed to have been introduced here by some Italians from Lombardy, who at the same time settled at Antwerp and among us; and this being prior to the building of the Royal Exchange, they used to meet in a place where Lombard-street now is, at a house they had called, The Pawn House, or Lombard, for transacting business; and as they were then the sole negotiators in insurance, the policies made by others in after times had a clause inserted, that those latter ones should have as much force and effect as those formerly made in Lombard-street.

From Mr. Park's excellent Digest of the law on this subject, from other approved writers, and from

[c] 2 Atk. 554.

[d] Park's Introd.

the Term Reports, the following abridgment has been compiled, which we shall now proceed to arrange under the separate heads, for affording a ready reference to the reader, viz:

I. OF MARINE INSURANCE, CONSIDERING,

1. *The Policy, its nature.*
2. *The construction to be put on it.*
3. *Warranties in Policies.*
4. *The Proceedings on Policies.*
5. *Of Re-assurances and Double Insurances.*

II. OF LOSSES UNDER SUCH POLICIES.

1. *Of total Losses, by peril of the Sea.*
2. *By Capture.*
3. *Detention.*
4. *Barratry.*
5. *Stranding.*
6. *General or Gross Average.*
7. *Partial Loss and Adjustment.*
8. *Salvage and Abandonment.*

III. OF FRAUD. ILLEGALLITY OR IRREGULARITY, WHICH EITHER VITIATE THE POLICY, OR PREVENT A RECOVERY THOUGH A LOSS HAPPEN.

1. *Of Direct Fraud in Policies.*
2. *Of changing the Ship.*
3. *Deviation on the Voyage.*
4. *Sea-worthiness.*
5. *Of Wager Policies.*
6. *Of valued Policies.*

7. *Of illegal Voyages.*
8. *Of Enemy's Ships, &c.*
9. *Of prohibited Goods and Commerce.*
10. *Return of Premium in cases of void or fraudulent Policies, &c.*

IV. OF BOTTOMRY AND RESPONDENTIA,

V. OF INSURANCE ON LIVES.

VI. OF INSURANCE AGAINST FIRE.

Before we enter into the detail, it may be proper to say a few words as to who may be insurers or underwriters ; and what property may in general be insured.

At common law, and by the usage of merchants, any person whatever might be an insurer ; but this having led to dangerous confidence on the one hand, and unprincipled fraud on the other ; an act of parliament was passed,^(e) authorizing his Majesty to grant charters to the Royal Exchange Assurance Company, and the London Assurance Company ; and which statute prohibited any other society or partnership from underwriting policies of insurance. Policies, therefore, are now either underwritten by those companies, or individual underwriters ; a policy subscribed by any society or partnership being absolutely void.^(f)

Upon this clause of the statute a question arose at Guildhall. It was an action brought against the

[e] 6 Geo. 1. c. 18.

[f] Park, 5th edit. p. 5, 9.

defendant, to recover a sum of money received by him from one Bristow, to the plaintiff's use. The plaintiff was an underwriter,^(g) and the defendant was a broker ; and a loss having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it ; but Bristow having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendant, to recover it from whom this action was brought; when lord Kenyon, C. J. expressed himself as follows: " I am of opinion " the plaintiff cannot recover; for this is clearly a partnership within the act of parliament. If a single " name appears upon the policy, as in this case, the " insurer shall never be allowed, if a loss happen " to defeat a *bona fide* insurance, by saying to an " innocent person, there was a secret partnership between another and myself, and therefore the policy " is void. But here the plaintiff is himself the underwriter, who comes to enforce an illegal contract; " it is a partnership *pro hac vice* ; and this party cannot apply to a court of justice to enforce a contract " founded in a breach of law."

Which decision was, in a more recent case, confirmed by the unanimous opinion of the court of Common Pleas,^(h) the learned judges thereof declaring, " that by the 6 Geo. 1. c. 18. the two corpora-

[g] Sullivan v. Greaves, Sittings after East. 1789.

[h] Mitchell and others, assignees of Robertson v. Cockburn, assignee of Tyler, 2 H. B. Rep. C. B. 379.

" tions became the purchasers of the exclusive privilege of insuring on a joint stock; and to give effect to that privilege, all other persons are prohibited from insuring on a joint stock."

In another case, (i) *A. B. and C.* became partners in insuring ships (contrary to the 6. Geo. 1. c. 18.) but it was agreed that the policies should be underwritten in the name of *A.* only; several policies were effected, and the premium received by *C.* and *D.* as brokers, held that *A.* could not recover those premiums from *C.* and *D.*

In a subsequent case, (k) all these cases were considered, and fully confirmed in the Court of Common Pleas, by lord Eldon, Heath, Rooke, and Chambre, justices.

The rule established by all these cases seems to be this, that if the credit of any company or society (except the two mentioned in the statute) be in any event pledged in a contract of this nature, (l) the contract is void. And therefore, where a company of ship-owners engaged to insure each others ships, though they covenanted *severally* and not *jointly*, to pay a certain sum in case of loss, in proportion to their respective shares; yet as there was a clause

[i] Booth and others, assignees of *Brown v. Hodgson* and another, 6 Term R. 405. [k] *Aubert v. Maze*, 2 Bos. and Pull. 371.

[l] *Lees v. Smith*, 7 Term R. 338.

providing that in case of the insolvency of any one of the members, all the others were to be responsible, the contract was void.

But in such an association, *(m)* each individual subscriber is only liable for the sum to which his name appears, and not for the default of the other subscribers; it has been held by lord Kenyon, that such an association does not infringe on the act of parliament.

There are clauses in a subsequent part of the statute, *(n)* securing to the South Sea and East India Companies, all the rights and privileges which they had enjoyed previous to the passing of that act, and the right of lending money on bottomry to the captains of their own ships.

The most frequent subjects of insurance are, first, ships, goods, merchandizes; the freight or hire of ships; secondly, houses, warehouses, and the goods in them, from danger by fire; and thirdly, lives, (of the two latter, see post V. VI.). Bottomry and Respondentia are also particular species of property which may be insured; *(o)* but which must be particularly expressed in the policy, unless by the usage of trade it is understood, (see post IV.) and *(p)* the

[*m*] *Harrison v. Miller*, sittings after M. 1796, 7 Term Rep. 340. note (d). [*n*] Sec. 24, 26, 28.

[*o*] *Glover v. Black*, 3 Burr. 1394. (*p*) 1 Black. Rep. 405.

lien of a factor upon goods is included in the term goods.(q)

But insurance on seamen's wages is prohibited,(r) or any thing that he is to receive at the end of the voyage in lieu of wages, e. g. *slaves*. Nor can he recover the value of such a thing in an action against his agent, for negligence in not procuring such insurance.

But goods may be insured,(s) though purchased with the proceeds of a former illegal cargo.

And(t) a governor of a fort may insure it against the attacks of an enemy.

And(u) the profits of a cargo employed in trade on the coast of Africa, are an insurable interest.

Upon(x) insurance on profits valued at 400*l*. where the plaintiff declared as for a *total loss*, and it appeared that after a shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the mar-

[q] *Godin v. the London Assurance Company*, 1 Burr. 489.

[r] *Webster v. De Tastet*, 7 Term Rep. 157.

[s] *Bird v. Appleton*, 8 Term Rep. 562.

[t] *Carter v. Boehm*, 3 Burr. 1905.

[u] *Barclay v. Cousins*, 2 East. 544.

[x] *Hodgson v. Glover*, 6 East. 316.

ket, and were sold; and it did not appear what profit was made of them, though it was found that the produce of those who were sold did not give a profit upon the whole adventure, held, that the plaintiff was not entitled to recover.

Insurance on imaginary profit was holden good.(y)

And where *A.* being indebted to *B.*, without any order from him consigns goods to *C.*, held, that *B.* had an insurable interest in the goods so consigned.(z)

Insurance on enemy's property is prohibited by stat. 33 Geo. 3. c. 27. s. 4.(a) but the existence of the act was limited to the then war; and the cases alluded to have settled that question, and such insurances are now held to be illegal.

We now proceed to our proposed arrangement; and I. 1. of the

Policy.

Policy is the name given to the instrument by which the contract of indemnity is effected between the insurer and insured; and it is not like most contracts, signed by both parties, but only by the insu-

[y] *Henrickson v. Margetson*, 2 East. 549. in note.

[z] *Hill v. Secretan*, 1 Bos. and Pull. 315.

[a] See post III. 5. 7. *Brandon v. Nesbitt*, and *Bristow v. Towers*, 6 Term Rep. 23 and 35. *Potts v. Bell*, 8 Term Rep. 548.

rer, (the party who takes on him the risk) who on this account, it seems, is called the underwriter.

There are two kinds of policies, the valued and open ; the difference is, that in the former, property insured is valued at prime cost at the time of effecting the policy ; in the latter the value is not mentioned. In the case of an open policy the real value must be proved, in the other it is agreed ; and it is just as if the parties had admitted it at the trial.(b)

They are only simple contracts, but of great credit, and ought not to be altered when once they are signed, unless there be some uniform document to shew that the meaning of the parties was mistaken,(c) or unless they be altered by consent.

A policy is a species of property for which *trover* will lie at the instance of the insured, if it be wrongfully withheld from him.(d)

The form of the policy now used(e) is two hundred years old, and is very irregular and confused, and often ambiguous. It is partly printed, to serve for general purposes, common to all policies ; and partly written, for the purpose of inserting the names

[b] 2 B. 1117.

[c] 1 Ven. 317. *Motteux v. London Ass. Company*, 1 Atk. 545.
Bates v. Graham, Salk. 444. [d] *Park*, 4. [e] *Malyne*, 108.

of the parties, (*f*) and to express their meaning ; and the written clauses shall accordingly controul the printed words. (*g*)

There are nine requisites of a policy. First, the name of the person insured. It was formerly much the practice to effect policies of insurance in blank, without naming the persons on whose account they were made ; (*h*) this was found both mischievous and inconvenient ; to remedy which the stat. 25 Geo. 3. c. 44. directed the names of all persons interested, or if they resided abroad, the names of their agents in this kingdom to be inserted in the policy. The provisions of this act, however, (*i*) not being without their attendant evils, it was repealed by stat. 28 Geo. 3. c. 56. ; which enacts, (*k*) that it shall not be lawful for any person to make assurance on ships or goods without inserting the name or firm of one or more of the parties interested ; or the name or firm of the consignor or consignee ; or of the person receiving the order for, or effecting the policy ; or of the person giving directions to effect the same. All policies without one or other of these requisites to be

[*f*] 3 Burr. 1555. [*g*] Park, 15.

[*h*] See Cox and another, Executors, v. Parry, 1 Term Rep. 464. in which it was held that the executors could not recover, because, amongst other grounds, the name of their testator was not inserted in the policy.

[*i*] Play and others v. Edie, 1 Term Rep. 313.

[*k*] The above decisions have become immaterial by 28 Geo. 3. c. 56. having repealed 25 Geo. 3. c. 44. vide Park, 19.

null and void. A trustee or consignee, therefore, (l) may insure in their own names, &c. while the ships, &c. are in transitu to this country. So may a prize agent; so may the captors of a ship seized as prize, and inserting the broker's name in the policy as agent generally, without saying for whom, (m) is a sufficient compliance with the 28 Geo. 3. c. 56. So it is if his name be inserted in the policies though not as agent.

Secondly, The names of the ship and master. (n) unless the insurance be general on any ship or ships. (o)

Where a policy described the insurance to be on goods (p) on board the ship called, "*The American ship President*," this was taken to be all name of the ship, and not a warranty of her being an American ship called the President. And where the policy after such name had the words, "*or by whatever other name the same ship should be called*," it was holden to be no variance, that the real name of the

[l] Crawford v. Hunter, 8 Term Rep. 13. Boehm v. Bell, ib. c. 154.

[m] Bell and others v. Gilson, 1 B. & P. 345. De Vignier v. Swanson, ib. 346. n. 6.

[n] See Kewley and another v. Ryan, 2 H. B. Rep. p. 343. on ship or ships, and Henchman v. Offey, ib. 345, note (a), and see Marshall on ship or ships.

[o] Park (19 a.)

[p] Le Mesurier and another v. Vaughan, 6 East. 382.

ship was *The President*, the identity of the ship meant to be insured with that name being proved.

An insurance was made upon a ship called, "The Leopard, or by *whatsoever other name or names the same ship should be called*,^(q)" whereof was master for that voyage *A. B.* or whosoever else should be master. Upon the evidence of *A. B.* it appeared that the ship of which he was master was called the *Leonard*, and was never called by the name of the *Leopard*; and it was insisted by the defendant's counsel that this was not the ship insured, it being of another name; and that the words, "by whatsoever other name or names the same should be called," would not help it, because those words meant where a ship was called by the name in the policy; and likewise by some other name; and not, as here, where it was never called by the name in the policy. For the plaintiff it was urged, that the words are, "by whatsoever other name the same ship shall be called;" and therefore it was only necessary to prove the identity, which was done here by captain *A. B.* who said that he was master of the *Leonard*; and that name was no more than one description of the ship. And of this opinion was the chief justice.

Thirdly, Whether the insurance be made on ships, goods or merchandizes; but there are some kinds of

[q] Hall v. Mollineux, 17 Dec. 1744, at Guildhall, coram Lee, C. J. ib. 385. MS. note read by Lawrence J.

merchandize which are of a perishable nature, and liable to early corruption ; on account of which the underwriters of London have inserted a memorandum at the foot of their policy, by which they declare, that in insurances " corn, fish, salt, fruit, flour, " and seed, are warranted free from average, unless " general, or the ship be stranded. Sugar, tobacco, " hemp, flax, hides, and skins, are warranted free " from average under *five pounds per cent* ; and all " other goods ; also the ship and freight are warranted free of average under *three pounds per cent*, " unless general, or the ship be stranded."(*r*)

This clause was introduced in 1749 (vid. *Cocking v. Fraser*, East. 25 Geo. 3.). The form of this memorandum was universally used until 1754, when the two insurance companies struck out the word, "*or the ship be stranded*," in consequence of the decision in *Cantillon v. London Assurance Company*, 3 Burr. 1553. We may here observe, (*s*) that a policy on goods generally, does not include goods lashed on deck, (*t*) the captain's clothes or the ship's pro-

[*r*] the only material difference between the memorandum of private underwriters, and those of the two insurance companies, consists in the omission of the words "*or the ship be stranded*," and that they insert *rum* among the articles upon which they will not be liable to any partial loss under *five per cent*, and *omit freight* out of the articles upon which there shall be no partial loss under *three per cent*. Vid. the forms of the different policies in the schedule to the 35 Geo. 3. c. 63.

[*s*] Park 21.

[*t*] Abbot on merchant ships, &c. Part. III. c. viii. 323. See post.

visions; but a policy on the ship and furniture includes provisions sent out in a ship for the use of the crew.(u)

Fourthly, The name of the place at which the goods are laden, and to which they are bound.(x) A policy therefore from London to — is void. It is also usual to state at what ports or places the ship may touch or stay, to avoid questions on deviation.(y)

Fifthly, The time when the risk commences and when it ends. On the goods it usually begins from the lading on board the ship, and continues till they are safely on board the ship; from her beginning to lade at A, and continues till she arrive at the port of destination, and be there moored in safety twenty-four hours.

In England no express time is fixed for the number of days in which people are obliged to unload their goods, the owners being left to their own discretion, provided there is no unreasonable delay, which must always depend upon circumstances.(z)

In an insurance on goods from A to B,(a) “until they should be there discharged and safely landed;” on their arrival at B, the merchant to whom

[u] 4 Term Rep. 206. [x] Moll. b. 2. c. 7. s. 14.

[y] Park 22. [z] Noble v. Kenoway, Doug. 492.

[a] Hurry v. Royal Assurance Company, 2 B. & P. 430.

the goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence the underwriters were held liable for the loss. (b)

But in an action on a policy on goods, (c) "until the cargo should be discharged and safely landed;" on the arrival of the ship, the goods insured were put on board a lighter hired in the usual way, and brought to the plaintiff's wharf in the evening, but not landed, on account of the rough weather; the plaintiff then undertook to see to the landing himself, but in the night the lighter was, by an unavoidable accident, sunk, and the goods lost; held, that the underwriters were discharged. (d)

Sixthly, The various perils against which the underwriters insure. The words now used in policies are so comprehensive that there is scarcely any event unprovided for. The insurer undertakes to bear "all perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests,

[b] *S. P. Rucker v. London Assurance Company*, Guildhall, 8 June 1784, coram Buller J. 432. note (a).

[c] *Strong v. Nataly*, 1 Bos. and Pull. New Rep. 16.

[d] See *Sparrow v. Carruthers*, 2 Stra. 1236. where a party by taking goods into his own lighter, discharged the underwriters. Rooke J. observed, that in *Hurry v. the Royal Exchange Company*, they did not intend to shake the authority of *Sparrow v. Carruthers*. ib. p. 19

“ restraints, and detainerments of kings, princes, and
 “ people of what nation, condition, or quality so-
 “ ever ; barratry of the master and mariners, *and all*
 “ *other perils*, losses, and misfortunes that have or
 “ shall come to the hurt, detriment, or damage of
 “ the said goods and merchandizes, and ship, or any
 “ part thereof.”

The policy is frequently made with the words, *lost or not lost*, in it, which are peculiar to English policies, and add greatly to the risk ; as though the ship be lost at the time of the insurance made, the underwriter is liable, if there be no fraud.(e)

There is one case, in which by act of parliament, the underwriters are prevented from paying upon certain risks mentioned in the printed policies, and that is in insurances upon cargoes of slaves. With a view to procure better treatment when in health, and a greater degree of care and attention when in sickness, for the objects of this traffic, the legislature has provided, that though the usual printed words may remain on the face of the policy, that no loss or damage shall thereafter be recoverable on account of the *mortality of slaves by natural death or ill treatment*, or loss *by throwing overboard* of slaves on any account whatever, or loss or damage by restraints or detainerments, by kings, princes, people, or inhabitants.

of Africa, where it shall be made appear that such loss or damage has been occasioned through any aggression for the purpose of procuring slaves, and committed by the master of any such ship, or by any person or persons commanding any boat or boats, or party or parties of men belonging to any such ship, or by any person or persons acting by the direction of any such master or commander respectively. (f)

Seventhly, The premium or consideration for the risk, which is always expressed in the policy to be received at the time of under-writing; but policies in general are effected by the intervention of a broker, between whom and the insurers open accounts are kept by the usage of trade (g); and who are therefore, it seems, liable, in an action, to the insurers, notwithstanding such admission by the words of the policy.

Where an English subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was *neutral*; this is a sufficient indication to the broker that the party acted as *agent*, and not on his own account; (h) and therefore the

[f] 34 Geo. 3. c. 80. s. 10: continued by 39 Geo. 3. c. 80. s. 24, 25.

[g] *Airy and others, assignees of Milton v. Bland, Park*, 5th edit. 27. [A] *Maaga v. Henderson*, 1 East. 335.

broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal.

Where credit was given by insurance brokers in an account delivered in by them to an underwriter, for the premiums of reassurances, declared illegal by the 19 Geo. 2. c. 37. after which the assured gave notice to the brokers not to pay the money over to the underwriter, and indemnified them for withholding it; (i) held, that the underwriter could not maintain an action against the brokers to recover such premiums as for money had and received by them to his use; the transaction being illegal, and the money not having been actually paid, but only credit given for it in account.

Eighthly, The day, month, or year on which the policy was executed. This insertion seems very necessary, because by comparing the date of the policy with the date of facts which happen afterwards, or are material to be proved, it will frequently appear whether there is any reason to suspect fraud or improper conduct on the part of the insured.

Ninthly, By the 44 Geo. 3. c. 98. the policy must be duly stamped, viz. for every policy on a coasting vessel, or to Ireland, Guernsey, Jersey, Alderney,

[i] Edgar and another, Assignees of Carden v. Fowler, 3 East. 222.

Sark, of the Isle of Man, where the premium shall not exceed 20s. per centum, 1s. 8d. and progressively for every 100l. insured, an additional duty of 1s. 3d. and so for any fractional part of 100l.; and where the premium shall exceed 20s. per centum, 2s. 6d. for 100l.; and for every additional 100l. 2s. 6d. and the like for any fractional part of 100l.; and for every policy on any other voyage, where the premium shall not exceed 20s. per centum, 2s. 6d. and 2s. 6d. for every additional 100l. and the like for any fractional part of 100l. and 5s. for every stamp on the policy where the premium shall exceed 20s. per centum, and 5s. for every additional 100l. insured, and every fractional part of 100l. See also 35 Geo. 3. c. 63. s. 1. to 16.

In a recent case, (k) it appeared to be usual for the underwriters at Lloyd's coffee house, to put down upon a slip of paper, all the risks they had taken in the course of the day; and one of the special jury said, they considered the party as bound by that slip, though he never signed a policy.

But lord Kenyon said, that whatever obligation there might be in honour and good faith, he certainly would not be bound in law; for in order to enforce the claim of the assured in a court of justice, he must produce a *stamped policy*.

[k] Rogers v. M'Carthy, *Sittings after Hil. Term, 1800.*

By stat. 11 Geo. 1. c. 30. when an insurance is made, a policy must be made out within three days, under a penalty of 100*l.*; and by the same statute promissory notes for insurances are void.

It is stated above, that policies are generally effected by the intervention of a broker, and that the name of the agent of an insurer residing abroad must be mentioned in the policy. It seems therefore, the proper place here to mention, that such agent or correspondent is liable to an action *for not insuring*, (*l*) which is to be tried on the same principles as an action on a policy; and the defendant is entitled to every benefit of which the underwriter might take advantage. The whole law on this subject is laid down in *Smith v. Lascelles*, (*m*) where Buller J. mentioned three instances in which such order to insure must be obeyed. 1. Where a merchant abroad has effects in the hands of his correspondent here. 2. Where though the merchant has no effects in the hands of his correspondent, yet the course of dealing has been such, that the one has been used to send orders for insurance, and the other to comply with them. 3. If the merchant abroad send bills of lading to his correspondent here, and ingrafts on them an order to insure, (*n*) as the implied condition on which the bills of lading shall be accepted.

[*l*] *Harding v. Carter* and another, *Sittings at Guildhall after Easter T. 1781.* [*m*] 2 Term Rep. 187.

[*n*] *Smith v. Lascelles*, 2 Term Rep. 187. and note.

So also if a merchant here accept an order for insurance, (o) and limit the broker to too small a premium, in consequence of which no insurance can be procured, he is liable to make good the loss to his correspondent.

But if a person to whom such order is sent, does what is usual to get the insurance made, (p) that is sufficient; because he is no insurer, and is not obliged to get insurance at all events. Thus, if he send to Lloyd's, and the underwriters refuse to take the risk at any premium; and he afterwards sends to get insurance done at Newcastle, he has done his duty, and can never afterwards be charged in this action, more especially if the plaintiff adopt and approve his conduct.

1. 2. The Construction to be put on the Policy.

A policy being considered as a simple contract of indemnity, must always be construed, as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. (q) And in questions on such construction, no rule has been more frequently followed

[o] *Wallace v. Telfair*, Sittings after Trin. 1786, before Buller J. 2 Term Rep. 188. note (a).

[p] *Smith v. Cologan*, 2 Term Rep. 188. note (a). N. P. before Buller J. Mich. 1787.

[q] 1 Burr. 347-8. 2 Salk. 443, 445. 2 Stra. 1265. and post III. 3.

than the usage of trade, with respect to the voyage insured.

A policy on a ship generally from *A* to *B*, was construed to mean till the ship was unladen.^(r) But if it contain the usual words, *till moored twenty-four hours in safety*, the insurers shall be answerable for no loss, that does not actually happen before the expiration of the time.^(s) Even though the loss was occasioned by an act (of barratry by the master) committed during the voyage insured.

Under a policy containing these words, the underwriters were held liable for subsequent loss; because the captain, the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine, and therefore the ship could not have said to have moored *twenty-four hours in safety*,^(t) although she did not go back for some days.

So where the ship *Hercules* was insured from *Bilboa* to *Rouën*, and till twenty-four hours moored in safety there. The ship arrived, an embargo having been previously laid on all English vessels in that port. The captain went on shore the day he arrived, and the next day the embargo was laid on his ship. He was afterwards permitted to land his cargo, which

[r] Skinn. 243. [s] Lockyer and others v. Offley, 1 Term Rep. 252.

[t] Waples v. Eames, 2 Stra. 1243.

he delivered to his consignees, but the ship was *detained as a prize*, and the captain and crew allowed subsistence as prisoners of war from the time of their arrival. Lord Kenyon held, she was as much within the power of the enemy as if a guard had been put on board the moment she arrived. She could not be said to be twenty-four hours, or a minute *moored in safety*; for immediately on her entering the port she was to all intents and purposes captured by the French.—Verdict for plaintiffs.(u)

But where a ship had arrived at the wharf, where she intended to unload on the 12th January, and was laid on the outside of the tier, there being no room to lay her in the inside, where the sails were unbent, topmasts struck, three anchors out, and she was also lashed to another ship, and so continued till the 19th, when several ships and a quantity of ice drove athwart her stern forced her adrift, and she was wholly lost; lord Kenyon was of opinion, that she was completely moored upon the 12th, and as the accident did not happen till above twenty-four hours after the time, the plaintiff was nonsuited.(x)

In a policy upon freight, if an accident prevent the ship from sailing, the insured cannot recover the freight,(y) which he would have earned if she had

[u] *Minet v. Anderson*, Peake 211. Sittings after Hil. 34. Geo. 3.

[x] *Angerstein v. Bell*, Sittings aft. Trin. 1795.

[y] *Tonge v. Watts*, *ibid.* 1251.

completed her voyage. But if the policy be a valued policy, and part of the cargo be on board when such accident happens, (z) the insured may recover to the whole amount.

Where a ship was chartered from *A* to *B*, there to take on board certain goods, and proceed to *C*, &c. for which the owner was to receive freight at so much per ton, a policy of insurance on such freight was held to attach from the sailing of the ship from *A*. (a)

When an insurance is *at and from* any place the ship is protected, (b) from her first arrival during her preparation for the voyage; but if all thoughts of the voyage be laid aside, the insurer is discharged; and it has been determined that the outward risk ends when the ship has moored in any port of an island (Jamaica) but does not continue till she comes to her last port of delivery in the island. (c)

In a similar case, lord Mansfield laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island to which it was

[z] *Montgomery v. Egginton*, 3 Term Rep. 362.

[a] *Thompson v. Taylor*, 6 T. R. 478. Aliter if the freight had been on goods, and the loss had happened before the goods were on board. [b] 1 Atk. 548. *Chitty v. Selwin*, 2 Atk. 359.

[c] *Camden v. Cowley*, 1 Black. Rep. 417.

destined; but that the outward policy upon goods continued till they were landed.(d)

The great and leading cases on questions of construction, are two, *Tierney v. Etherington* and *Pelly v. Royal Exchange Company*.(e) In these cases the principles to be observed in the construction of policies, are fully considered; and in the latter of them lord Mansfield observed, that, "the insurer at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it; and what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy." The same principles were adhered to in a subsequent case, where the same learned judge remarked that every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it he ought to inform himself.(f) So in the construction of a policy upon time,(g) the same liberality prevails as in other cases;(h) and an attention to the meaning of the contracting parties has always been paid.(i)

[d] *Barrass v. London Assurance Company*. *Sittings after Hil* 1782, at Guildhall, which doctrine was confirmed by a modern decision, *Leigh v. Mather*, *Park* 38. [e] 1 *Barr.* 348.

[f] This doctrine was confirmed by lord Kenyon, and the whole Court of King's Bench, in *Brough v. Whitmore*, 4 *Term Rep.* 206. See post. [g] *Syers and others v. Budge*, *Dougl.* 569.

[h] *Ibid.* 527, 531.

[i] By 35 *Geo. 3. c. 63. s. 12.* no policy upon any ship, or interest therein, shall be made for any longer time than 12 calendar months.

The usage of trade with respect to East India voyages has been more notorious than in any other, the question having more frequently occurred. The charter-parties of the East India Company give leave to prolong the ship's stay in India for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general, without limitation of time or place. These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship might be sent while in India, though not expressly mentioned in the policy. These principles were fully laid down and settled in the nine causes tried upon the ship *Winchelsea* East Indiaman ;(k) the nine verdicts in which were ultimately uniform for the plaintiffs the insured, against the underwriters, which have been since recognized and allowed in subsequent cases.(l)

Two partners purchased a ship under a bill of sale,(m) conformable to the stat. 26 G. 3. c. 60.; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others; held, that the four partners had not any insurable interest in the freight of the ship.

[k] *Salvador v. Hopkins, &c.* 3 Burr. 1707. and seq.

[l] *Lavabre v. Wilson, and Lavabre v. Walter*, Dougl. 284.

[m] *Camden v. Anderson*, 5 T. R. 709.

The right to freight results from the right of ownership, and these four partners had neither a legal or an equitable title to the ship.(n)

So in an action upon a policy "on goods,(o) specie, and effects of the plaintiffs, on board the ship "on her voyage from London to Madras and China, "with liberty to touch, stay, and trade at any ports "or places whatsoever;" a similar question arose upon the following facts: When the ship arrived at Madras she was too late to go to China that year, upon which she was employed by the counsel there to go from Madras to Bengal to fetch rice, which voyage she performed once, and in attempting to perform it a second time was lost. The jury found a verdict for the plaintiff, which was afterwards confirmed by the Court of King's Bench.

So also in a subsequent case,(p) the Court of King's Bench decided on the usage of the India trade, where the insurance was from "London to Madras and Bengal," where the usage was, that when the ship arrived at Madras the council might send her elsewhere, of which usage the underwriters were bound to take notice.

So in the case of the ships the *Hope* and the *Anne*, which were insured at and from Dartmouth to Wa-

[n] Ibid. [o] Gregory v. Christie, B. R. Trin. 24. G. 3.

[p] Farquharson v. Hunter, B. R. Hil. 25. G. 3.

terford,(g) and from thence to the port or ports of discharge on the coast of Labrador with leave to touch at *Newfoundland till the goods should be safely discharged and landed*. From the time of their arrival the crew were chiefly employed in fishing, and took out their cargo only at leisure times (which was fully proved to be the usage) and the ships were taken by a privateer before they were unloaded. The court held that the insurers were liable; for that according to the usage there was no delay.

However, the parties may, by their own agreement, prevent such latitude of construction; nor need this be done by express words of exclusion; but if, from the terms used, it can be collected that the parties meant so,(r) that construction shall prevail; and the equitable principles of construction shall never be carried so far as that when a man has insured one species of property he shall recover a damage which he has suffered by the loss of a different species.(s). Thus, one who has insured a cargo of goods, cannot, under that insurance, recover the freight paid for the carriage; nor can an owner who insures the *ship merely* demand satisfaction for the loss of the merchandize laden thereon,(t) or extraordinary wages paid to seamen, or the value of provisions by reason of detention of the ship at any port.

[g] *Noble and others v. Kennoway*, Doug. 472. [r] Doug. 27..

[s] *Eden v. Poole*, *Sittings after Hil. 1785*.

[t] *Robertson v. Ewer*, 1 Term. Rep. 127.

In an insurance *upon the ship Tartar*,^(u) at and from London to Newcastle and Marseilles, and at and from Marseilles to her discharging port or ports in the West Indies (Jamaica excepted), the facts were, that the ship being distressed bore away for Minorca and put into Port Mahon, where the captain obtained leave from the Vice-admiralty court to have his ship surveyed,^(x) in consequence of which she was long detained; and the action was brought to recover the extraordinary wages, and the provision expended during the detention for these repairs. Lord Mansfield was of opinion, that such articles as sailors' wages and provisions expended, while a ship is detained to refit, can never be allowed as a charge against the insurer *on the ship*; and a verdict was accordingly given for the defendant.

In the construction of policies, the loss must be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover. This rule is illustrated by a case of insurance upon negroes.^(y)

Insurance on goods from *A* to *B*, "until they should be there discharged and safely landed;" on their arrival at *B*,^(z) the merchant to whom the

[u] Fletcher and others v. Poole, *Sittings after East*. 1769.

[x] Park 53. [y] Jones v. Schmoll, 1 Term Rep. 130, note(a).

[z] Hurry v. The R. E. Assurance Company, 2 B. and P. 430
Rucker v. the R. E. Assurance Company, *ibid.* 432. n.

goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter, without negligence, the underwriters were held liable for the loss.

Policy on freight valued at 500*l.* on a voyage at and from Demarara, Berbice, and the Windward and Leeward Islands, to London; the ship being at Demarara an agreement was entered into by the master with a house there, for a freight from Berbice to London, the cargo to be put on board at Berbice, and the ship to take a cargo of bricks and planks from Demarara to Berbice, and deliver them there; while proceeding from Demarara to Berbice, with the bricks and planks on board, she met with an accident, and in consequence never carried her freight; held, that it was not a loss within the policy.^(a)

Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense.

As where by a policy of insurance, ship and goods were insured, “at and from all and every port &c. on the coast of Brazil, and after the 7th September, to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof aboard the

[a] *Seller v. M'Vicar*, 1 B. & P. New Rep. p. 23.

“ said ship at all and every port, &c. on the coast of Brazil, and *from the 17th September 1800*, and “ *upon the ship in the same manner*,”(b) and with liberty to sail to, &c. any places backwards and forwards under the *Portuguese* government, &c. at a premium of four guineas *per cent.* to return 3*l.* 10*s.* should the ship have arrived, or the risk have sooner ceased than on or before the 17th September; held, that the policy only attached on the homeward-bound cargo laden on board *at the coast of Brazil*, and did not cover a cargo originally taken in *at the Cape of Good Hope*, and which continued on board after the 17th of September, while the ship was on the Coast of Brazil, and after she left it on her return to the Cape; neither did the policy cover the ship itself, which was insured *in the same manner* as the goods.

A policy on a foreign ship(c) must be understood as containing an exception of all captures made by the authority of our own government.

Every insurance on alien property by a British subject, must be understood with this implied exception, that it shall not extend to cover *any* loss happening *during the existence of hostilities* between the respective countries of the assured and assurer.(d).

[b] Robertson and another v. French, 4 East 130.

[c] Kelner v. Le Mesurier, 4 East 396.

[d] Brandon v. Curling, *ibid.* 410.

Where a ship was chartered in a voyage from London to Dominica,^(e) and back to London, at a certain rate of freight upon the outward cargo; and after delivering her outward cargo at Dominica, the charterers were to provide her a full cargo homeward, at the current freight from Dominica to London, &c.; held, that an insurance by the owner of the ship on the freight, *at and from* Dominica to London, attached while the ship lay at Dominica delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy; the contract of a freightment by the charter-party being entire, and the risk on the policy having commenced.

Goods insured on board a certain ship generally by her name,^(f) without any addition of country, and not represented to be of any particular country at the time of the policy being subscribed; though the broker had before said she was *an American* when the ship was subscribed, and though she was in fact *an American*, need not be documented as such; and therefore, in case of a capture by a foreign state for want of the documents required by treaty between that state and her own, the owner of the goods may recover against the underwriters.

[e] *Horncastle v. Suart*, 7 East 400.

[f] *Dawson v. Atty*, 7 East 367.

Where a mob having seized a vessel laden with corn, (g) and stranded her, took away part of the cargo; court held, assured could not recover upon a count stating the loss to be by a seizure by *people*; that word in the policy meaning *the ruling power of the country*.

Where a licence to trade with an enemy granted abroad, (h) had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents, the paper not being considered as of any further use at the time; and the witness' attention not having been then called particularly to the circumstances; and the witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum book, for the private information of himself and the governor; which book was not produced, he having given it to the governor, who was gone abroad without returning it to him; for such book, if in court, would not have been evidence *per se*; but could

[g] Nesbitt v. Kensington, 4 Term Rep. 783.

[h] Kensington v. Inglis and another, in error, 8 East 273.

only have been used by the witness to refresh his memory.

Goods and specie to a certain amount having been insured by a policy on ship or ships, which should sail on the voyage insured between the 1st of October 1799, and the 1st of June, 1800; a memorandum written on the policy, 11th June, extending the time of sailing to the 1st August 1800, does not require a new stamp, being within the 13th section of the stat. 35 Geo. 3. c. 63. which provides, that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in *terms or conditions* of any policy, &c. (i)

Where a certain merchant trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the king's authority; held, that an insurance on the *enemy's ship*, as well as on the goods

[i] The stat. 35 Geo. 3. c. 63. s. 12. provides, that the act shall "not extend to prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of insurance, duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration; so that such alteration be made before notice of the determination of the risk originally insured, &c.; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration."

and specie put on board for the benefit of British subjects, was incidentally legalized; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war, the trust not contravening any rule of law or of public policy; and there being no personal disability in the plaintiff on the record to sue.

A policy effected on "*ship and outfit*," on a voyage upon the southern whale fishery out and home, ^(k) cannot be altered by consent, after the ship sails and the risk attaches, to an insurance on "*ship and goods*," without a new stamp; *outfit*, the subject matter of insurance being essentially different in such voyage from *goods*; and therefore, not within the exception of the stat. 35 G. 3. c. 63. s. 13. which enables alterations to be made in the *terms or conditions* of a policy without having a new stamp, so that *the thing insured remains* the property of the same persons, &c.

The policy in this case, as it originally stood, was on *ship and goods*, which was restrained by a written note in the margin to *ship and outfit*; after which the indorsement restored it to *ship and goods*,

It seems, however, that shifting or successive cargoes on board the same ship in the course of the

[k] Hill v. Patten, 8 East. 373.

same adventure, (as in the African and other trades) out and home, may be covered by an insurance on goods.

I. 3. Of Warranties in Policies.

A warranty, in a policy of insurance, is a condition or a contingency, that a certain thing shall be done or happen,^(l) and unless that is performed there is no valid contract. It is immaterial for what end, if any, the warranty is inserted in the contract; but being inserted it becomes a binding condition upon the insured, and he must shew a literal compliance with it.^(m) So, on the contrary, warranties shall be strictly construed in favour of the insured. As where a ship is warranted well on any day certain, though she be lost by eight in the morning of the day when the policy was effected at noon,⁽ⁿ⁾ the underwriter shall be liable. It is no matter whether the loss happened in consequence of the breach of warranty or not, for the very meaning of inserting a warranty is to preclude all inquiry about its materiality.^(o) It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to the merest accident, or to the most wise and prudential reasons, the policy is avoided.^(p)

[l] 1 Term Rep. 345.

[m] Park, 318.

[n] Blackhurst v. Cockell, 3 Term Rep. 360.

[o] 1 Term Rep. 346.

[p] Cowp. 607.

In this strict and literal compliance with the terms of a warranty, consists the difference between a warranty and a representation ; the latter of which need only be performed *in substance*, while a warranty must always be complied with strictly. In a warranty the person making it takes the risk of its truth or falsehood on himself ; in a representation, if the insured asserts that to be true which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud ;(g) but a representation made without fraud, if not false in a *material* point, does not vitiate the policy.(r)

In order to make written instructions binding as a warranty, they must appear on the face of, and make a part of, the policy.(s) For though a written paper be *wrapt in the policy*, and shewn to the underwriters at the time of subscribing, or even if it be *wafered to the policy*,(t) it is not a warranty, but a representation. But a warranty written *in the margin* (transversely or otherwise) of the policy, is considered to be equally binding, and liable to the same strict construction as if written in the body of the policy.(u) If the underwriter pay the loss on a policy, and after find that such warranty was not strictly complied with,(x) he may recover back the money again by action.

[g] Pawson v. Watson, Cowp. 787. [r] See post III. 1.

[s] Cowp. 790. [t] Pawson v. Barnevelt, Doug. p. 12. in (n.)

[u] Dougl. 11, 12. n. 4. 13. n.

[x] De Hahn v. Hartley, 1 Term Rep. 345.

The various kinds of warranties are too numerous to be mentioned, depending generally upon the particular circumstances of each case. The three cases of warranty, on which most questions have arisen, are, as to the *time* of sailing, *convoy*, and *neutrality* of property.

As to the first of these, if a man warrant to sail *on* a particular day, (*y*) and be guilty of a breach of that warranty, the underwriter is no longer answerable. And a detention by government, previous to the proposed day of sailing, is no excuse for not complying with the warranty, nor a peril within the terms of the policy.

So if the warranty be to sail *after* a specific day, (*z*) and the ship sail *before*, the policy is equally avoided as in the former case.

But when a ship leaves her port of lading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, (*a*) for which purpose she touches at any particular place of rendezvous for convoy, &c. ; her voyage must be said to commence from her departure from that port, (*b*) and though she be

[*y*] Hore v. Whitmore, Cowp. 784.

[*z*] Vezian v. Grant, cor. Buller J. East. Vac. 1779.

[*a*] Bond v. Nutt, Cowp. 601.

[*b*] Thellusson v. Ferguson, Doug. 361.

detained at such place of rendezvous by an embargo, she has complied with the warranty.

What shall be a departure from the port of London, or rather, what is the port of London, remains yet undecided. It seems, however, that Gravesend is the limit of that port, where vessels receive the Custom-house cocket, their final clearance on board,(c) and from whence they must depart on the day mentioned in the warranty.

As to warranty of sailing with convoy. If the insured warrant that the vessel *shall depart with convoy*, and it do not, the policy is defeated, and the underwriter is not responsible. A *convoy* means a naval force under the command of that person whom government,(d) or any authorized by them, may happen to appoint.

A sailing with convoy from the usual place of rendezvous, as Spithead for the port of London,(e) is a *departure* with convoy within the meaning of such a warranty. And although the words used are generally to *depart with convoy*, or to *sail with convoy*,(f) yet they extend to sailing with convoy throughout the voyage; and this was unanimously confirmed by the whole court in more modern times.(g)

[c] Park c. 18. [d] Park. c. 18.

[e] 2 Salk. 443. Gordon v. Morley, 2 Stra. 1265.

[f] Jeffrey v. Legendra, 3 Lev. 320.

[g] Lilly v. Ewer, Doug. 72.

But an unforeseen separation from convoy is a peril to which the underwriter is liable.^(h) And even when the ship has, without any neglect, by tempestuous weather, been prevented from joining the convoy at all; at least, so as to receive the orders of the commander of the ships of war; if she do every thing in her power to effect it,⁽ⁱ⁾ it shall be deemed a satisfaction of the warranty to sail with convoy. The duty of officers appointed for convoy to merchant ships, is prescribed by stat. 13 Car. 2. st. 1. c. 9. art. 17. confirmed by stat. 22 Geo. 2. c. 33. sec. 2. art. 17. the 38 Geo. 3. c. 76.^(k) and the 39 Geo. 3. c. 32. and which latter statute permits vessels laden with the produce of the fisheries, &c. of Newfoundland and Labrador to sail without convoy or license, notwithstanding the 38 Geo. 3. c. 76. sec. 1. &c.; and by stat. 43 Geo. 3. c. 57. sec. 1. no British vessel shall sail without convoy; nor separate from convoy without leave, sec. 2. under a penalty of 1000*l.* and in certain cases of 1500*l.* sec. 3. and insurances on vessels sailing without convoy are declared void, sec. 4.; and further enacts, that no vessels shall be cleared out till bond be given not to sail without convoy, sec. 5. with certain exceptions, which are detailed in sec. 6, 8, 15, 16. and masters of vessels are directed to have flags to answer signals, or not to be cleared outwards, sec. 9 and 10.^(l)

[*h*] 3 Lev. 320. 2 Salk. 442. Carth. 216. 1 Show. 320. 4 Mod. 58. S. C. [*i*] *Victoria v. Cleeve*, 2 Stra. 1250.

[*k*] Park 350. n.

[*l*] See post II. 4.

The last species of warranty above-mentioned, is that of *neutrality*; or that the ship and goods insured are neutral property. This is different from the two former; for if this warranty be not complied with, the contract is not merely voided as for a breach, but it is absolutely void, *ab initio*, on account of fraud, being a fact at the time of insuring within the knowledge of the insurer, *(m)* an error in which must therefore arise from a deliberate falsehood on his part. *(n)* But if the ship, &c. is neutral at the time the risk commences, *(o)* the insurer takes upon himself the chance of war and peace during the continuance of the policy.

Sailing orders are necessary to the performance of a warranty to depart with convoy, *(p)* unless particular circumstances exempt the insured from the general rule. *(q)*

Where a policy described the insurance to be goods on board the ship "*called the American ship President*;" *(r)* this was taken to be all *name* of the ship, and not a *warranty* of her being an *American ship called the President*. And where the policy after such name had the words, "*or by whatsoever other name the same ship should be called*," it was:

[*m*] 4 Burr. 1419. 1 Black. Rep. 427.

[*n*] See post III. [*o*] Doug. 732. Eden v. Parkinson.

[*p*] Webb v. Thompson, 1 Bos. & Pull. 5.

[*q*] Anderson v. Pitcher, 2 B. & P. 164.

[*r*] Le Mesurier v. Vaughan, 6 East 382.

holden to be no variance that the real name of the ship was the *President*, the identity of the ship meant to be insured with that name being proved.(s)

A warranty in a policy of insurance that the ship is American property, means that the ship is entitled to all the privileges of an American flag; and if she have no passport on board (which is required by treaty between France and America) the *warranty* is not complied with,(t) and the assured cannot recover against the underwriter, though in fact the ship suffer no inconvenience in the voyage from the want of the passport.

In an insurance on a ship at and from Hull to Bilboa,(u) warranted to depart from England with convoy, the voyage from Hull to Portsmouth, where she meets with convoy, and from thence to Bilboa may be considered as distinct; and in case of a loss between the two places, an apportionment and return of premium may be demanded.

The 25th article of the treaty of February 1778, between America and France, which requires the vessels of the allies,(x) in case either is at war, to be furnished with a passport, expressing (inter alia) *the*

[s] Hall v. Molineux, at Guildhall, 1744. cor. Lee. C. J. cited ib. 385. [t] Rich v. Parker, 7 Term Rep. 705.

[u] Rothwell v. Cooke, 1 Bos. & P. 172.

[x] Baring v. Christie, 5 East 398.

place of habitation of the commander of the vessel, is not complied with by a passport granting leave "to G. D. commander of the ship called M. V. of *the town of P.* of the burden of," &c. Such description of place being applicable only to the *ship* as the last antecedent, which is further described by her burthen in a continuing sentence; and therefore the plaintiff was holden not entitled to recover upon a policy of insurance on such ship warranted *American*, which had been captured and condemned as prize.

A warranty of neutrality in a policy of insurance, (y) is not falsified by a sentence in a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented

Where a foreign court of prize professes to condemn a ship and cargo, on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured; such sentence is conclusive in our courts against *a warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriters, (z) although inferences were drawn in such sentence from *ex parte* ordinances in aid of the conclusion of such infraction of treaty.

[y] Pollard v. Bell, 8 Term Rep. 434.

[z] Baring. v. The Royal Exchange Assurance Company, 5 East 99.

In an action on a policy of insurance on goods warranted *American*,^(a) on board a ship from London to Virginia, a sentence of a foreign court, which, after reciting that “forasmuch as the true destination of the vessel was for the English islands, “having been hired and loaded at London, and having on board eighty barrels of gunpowder, declares the ship and cargo a good prize,” is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion.

By the sentence of a French court of Admiralty,^(b) it appeared that the ship insured, warranted *American*, had been condemned as enemy’s property for want of having on board a *role d’equipage*, or list of the crew, such as is required by a maritime ordinance of France, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America; held, to be conclusive evidence against the warranty of neutrality, though in fact the ship was *American*.

A warranty that the property was Danish,^(c)—(Denmark being then a neutral power)—in a policy of insurance on a ship and goods, was holden to be

[a] Calvert v. Bovill, 7 Term Rep. 523.

[b] Geyer v. Aguilar, 7 Term Rep. 681.

[c] Garrels v. Kensington, *ibid.* 230. (see ante).

conclusively disproved by a sentence of a court of Admiralty condemning the ship and cargo, because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship, which had been seized and carried into port by a belligerent power, for the purpose of search.

Any forfeiture of neutrality by the wilful act of the assured or of the master, &c. (*d*) after the commencement of the voyage insured, is a breach of warranty of such neutrality.

A warranty of neutrality in a policy of assurance, (*e*) is not falsified by a sentence of a foreign court of Admiralty, condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented.

A sentence of a foreign court of prize is conclusive evidence in an action upon a policy of insurance, (*f*) upon every matter within the jurisdiction of such court, upon which it has professed to decide. Therefore, where a Danish ship *warranted neutral*, was captured by a French ship of war, (Denmark being at peace with France) and the court in which she was libelled as prize, professing to con-

[*d*] *Garrels v. Kensington*, 7 Term Rep. 230.

[*e*] *Bird v. Appleton*, 8 Term Rep. 562.

[*f*] *Bolton v. Gladstone*, 5 East 155.

sider that the *built* of the vessel was *unknown*, and that she was *sold* to a *neutral* subject *only* since the declaration of war; that the bill of sale does not mention her *place of built*, or her original owner; that the mate and third officer were naturalized *Danes only* since the declaration of war; and that the greater part of the *crew* were subjects of *hostile* powers, condemned the ship as *good* and *lawful prize*; such condemnation is conclusive against the *warranty of neutrality* in an action on the policy against the underwriter. And no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded, although the sentence proceeded to refer to certain ordinances of France, containing rules to direct the the judgment of its courts in the consideration of the question of neutrality, by which rules the prize court appeared to have regulated their judgment in the conclusion they had drawn.

I. 4. *Of the Proceedings on Policies.*

Under the present head, it is intended to point out in what manner, and by what form of legal proceeding, a man who has insured property, and has sustained a loss, is to recover against the underwriters upon the policy.—The oldest case in the books on a marine policy of insurance, is in 7 Rep. 47. b. which only serves, however, to shew that this contract was at that time very little understood. In the reign of

queen Elizabeth, *(h)* a statute was passed to erect a particular court for the trial of insurance causes in a summary way, by a commission to the judge of the Admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, with an appeal by bill to the court of Chancery. This stat. was explained by a subsequent one, but the court erected by them is now entirely disused; *(i)* for this, among many other reasons, *(k)* that its jurisdiction was not sufficiently extensive. Insurance causes are now therefore decided like all other questions of property, by a trial by jury in a court of common law; and which, on due consideration, will appear the most safe, eligible, and (as now regulated) expeditious mode that could be adopted. *(l)*

Courts of equity have no jurisdiction over such questions, because the demand is plainly a demand at law, and the damage as much the object of proof of witnesses, *(m)* as any other species of damage whatever. If, indeed, the trustee in a policy of insurance actually refuse his name to the *cestui que trust*, in an action, or a commission is necessary to examine witnesses residing abroad; or where fraud is suspected, and a disclosure of circumstances is to be procured upon the oath of the insured; in these cases

[*h*] 43 Eliz. c. 12. [*i*] 13 & 14 Car. 2. c. 23.

[*k*] Stra. 166. 1 Show. 396.

[*l*] Park's Intro. [*m*] *De Ghetoff v. London Assurance Company*, 3 Bro. P. C. 525.

application may be to a court of equity. (n) But in all other cases, a court of common law is the proper forum. And even if the parties by a clause in the policy, should agree to refer any dispute to arbitration, that will not be a sufficient bar to an action at law, (o) unless a reference is in fact made, or is depending. (p)

In order to recover upon a policy against either of the insurance companies (the Royal Exchange or London Assurance,) the action must be *debt* or *covenant*, (q) as their policies are under seal; from hence arose an inconvenience, as under the plea of a general issue in these actions, the true merits of the case could seldom come in question; to remedy this, the stat. 11 Geo. 1. c. 30. sec. 43. enables the jury to give such part only of the sum demanded in debt, or so much damages in covenant, as on the evidence it appears the plaintiff in justice ought to have. (r) Several other insurance companies have been since erected. (s)

In order to recover against a private underwriter upon the policy, who merely subscribes his name

[n] 1 Atk. 547. *Chitty v Selvin* and another, 2 *ibid.* 359. Park c. 30. [o] *Hill v. Hollister*, 1 Wills. 129.

[p] In *Thompson v. Charnock*, 8 T. R. 139. it was held, that a covenant in a deed to refer all matters is not sufficient to oust the courts of law and equity of their jurisdiction.

[q] The Royal Exchange Assurance Company and the London Assurance Company, erected by 6 Geo. 1. c. 18.

[r] Park 396. [s] See 39 Geo. 3. c. 83. &c. &c.

without any seal ;(t) the form of action is an *indebitatus assumpsit*, founded upon the express contract, which action may be brought in the name of the broker effecting the policy ; and by stat. 19 Geo. 2. c. 37. sec. 6. within fifteen days after action brought, the plaintiff on request in writing,(u) must declare the amount of all insurances on the same ship.

It was formerly usual for the insured to bring separate actions against each of the underwriters (how many soever) on a policy, and proceed to trial on all. This was found to be expensive and in fact, unjust ; and the court of King's Bench intimated, that in such a case they would grant imparlances in all the actions but one,(x) till that could be tried. At length lord Mansfield introduced the present *consolidation rule*,(y) which is now admitted in general practice, by which the proceedings in all the actions but one are staid ; and in consequence of this convenience the defendant undertakes not to file any bill in equity, or bring a writ of error for delay, and to produce all books and papers material to the point in issue.(z)

The stat. of 19 Geo. 2. c. 37. sec. 7. also enables defendants to pay money into court in all such actions ; after which, if the plaintiff proceeds, and has not a verdict for more than the money paid in, he shall pay costs to the defendant.

[t] 3 Black. Com. 157.

[u] Park, c. 20.

[x] 2 Barn. B. R. 103.

[y] 1 Tidd. 557.

[z] Park's Introd.

When money has been paid by mistake to the assured, or where the assured wishes to recover back the premium, (a) the proper remedy is by action for money had and received to the plaintiff's use.

The declaration on a policy of insurance must set out the policy, and aver that it was signed by the defendant, and, that in consideration of the premium, he undertook to indemnify the insured, and shew that the loss happened by one of the perils mentioned in the policy, (b) which must always be stated according to the truth of the fact.

More particularly as to the manner of alleging the loss to have happened within the perils of the policy. (c) To aver that the loss happened by the fraud and negligence of the master, has been held a sufficient averment of barratry; though it is now usual to aver precisely, in terms, that the loss happened by the barratry of the master or mariners. (d) Though the declaration allege a total loss, the insured may recover for a partial one; (e) for in actions for damages merely, the plaintiff may always recover less, but not more than the sum laid in the declaration. So, though the plaintiff appear in proof to have a larger interest than is averred in the declaration.

[a] 1 Salk. 22. Skinn. 472. 1 Show. 156. [b] Park, c. 20.

[c] Knight v. Cambridge, 2 Ld. Raym. 1349. 1 Stra. 581.

[d] Park, c. 20.

[e] Gardiner v. Croxedale, 2 Burr. 904. 1 Black. Rep. 198.

the court upon the argument of the demurrer in *Craufurd v. Hunter*, the counsel for the defendant tendered his lordship a bill of exceptions. This bill of exceptions was argued three several times in the Exchequer Chamber, and the judgment of the court of King's Bench was affirmed by lord Alvanley, Chief Justice of the Common Pleas, &c. in error, Exchequer Chamber, Hilary 1802.

In order to entitle the insured to recover expenses of salvage, it is not necessary to state them in the declaration as a special breach of the policy. They may be given in evidence, because an insurance is against all accidents,⁽ⁿ⁾ and salvage is an immediate and necessary consequence of those stated in a policy.

As the brokers transact the chief part of the business, and generally pay the premiums, the law has given them a *lien* upon the policies in their hands, so as to enable them to deduct out of any monies they may receive for the assured, not only the premium and commission due on the particular policies, but the general balance due to them on the account between them and their principals.^(o) And it has also been decided, that if a broker should part with the possession of the policy, so as to lose his lien upon it;

[n] Hardw. 304.

[o] *Whitehead v. Vaughan*, Tria. 25 Geo. 3. in *B. R. Parker & al. v. Carter*, C. P. Tria 1788.

yet if it get back into his hands for any purpose whatever, the lien revives.

It is also common for the broker to open the policy in his own name, (*p*) at the same time declaring for whose use, benefit, or interest, the same is made; and as the policy may be made in the name of the broker, so also may the action be brought in his name, (*q*) as was done in the case of Godin and the Royal-Exchange Assurance Company, (*r*) and a variety of other cases.

As the contract of insurance depends so much upon the purest good faith, and the most liberal communication of circumstances, relative to each particular case; when gaming insurances without interest, were abolished by the legislature, in order effectually to answer the purpose intended, it became necessary to order that a disclosure of all insurances, effected on the same property should be made, even after an action brought.

Thus it was declared, "that in all actions or
"suits brought or commenced by the assured, (*s*)
"upon any policy of assurance, the plaintiff in such
"action or suit, or his attorney or agent, should
"within fifteen days after he or they should be re-
"quired so to do in writing by the defendant, or

[*p*] 25 Geo. 3. c. 44.[*q*] 28 Geo. 3. c. 56.[*r*] 1 Barr. 490.[*s*] 19 Geo. 2. c. 37. sec. 6.

“ his attorney or agent, declare what sum or sums
“ he had assured, or caused to be assured in the
“ whole, and what sums he had borrowed at res-
“ pondentia or bottomry, for the voyage in question
“ in such suit or action.”

In addition to this very wise provision, it having appeared to the legislature that some vexatious persons, notwithstanding the perfect willingness of the insurers to pay losses to which they were liable, still persevered in bringing actions, by which the defendants were put to great and heavy charges, and had no means of paying the money into court; it was therefore enacted,(t) “ That it should and
“ might be lawful for any person or persons, body
“ or bodies corporate, sued in any action or actions
“ of debt, covenant, or any other action or actions,
“ on any policy or policies of insurance, to bring
“ into court any sum or sums of money; and that if
“ any such plaintiff or plaintiffs should refuse to ac-
“ cept such sum or sums of money so brought into
“ court as aforesaid, with costs to be taxed, in full
“ discharge of such action or actions, and should
“ afterwards proceed to trial in such action or ac-
“ tions, and the jury should not assess damages to
“ such plaintiff or plaintiffs, exceeding the sum or
“ sums of money so brought into court, such plain-
“ tiff or plaintiffs in every such case and cases,
“ should pay to such defendant or defendants, in

[t] 19 Geo. 2. c. 37. sec. 7.

"every such action or actions, costs to be taxed ;
"any law, custom, or usage to the contrary notwithstanding."
"standing."

The general issue, *non assumpsit*, is the usual plea to a declaration upon a policy against private persons ; and under this plea and the general issue, pleadable by corporations, the defendant has a right to take advantage of all those circumstances which either render the policy void, or make it of no effect ; (u) such as fraud, want of interest, not being sea-worthy, deviation, non-performance of warranties, &c.

The evidence to be given, and the proofs necessary in actions on policies of insurance, may be collected from the statement of the allegations requisite in the plaintiff's declaration. It may in addition, be shortly observed on this part of the subject, that the first piece of evidence is proof of the defendant's hand-writing to the policy, which, however, is most generally admitted. Though the general usage of trade is allowed to be given in evidence to controul, or extend the words, (x) yet no parole evidence shall be given which directly tends to contradict the terms of a policy. In an action against the underwriter, the policy is evidence that the premium was paid ; (y) the insured, however, must prove his *inte-*

[u] *Park*, 404. c. 20. [x] *Knales v. Knightly*, *Shipp.* 54.

[y] *Russel v. Boehme*, 2 *Str.* 1127.

rest by a production of all the usual documents, (z) bills of sale, bills of parcels, of lading, &c. except where the policy is a valued one, in which case, if it be a total loss, it is only necessary to prove that the goods were on board at the time of the loss; unless the defendant can shew that the plaintiff had only a colourable interest, or has greatly overvalued the goods. (a)

The first great cause in which the law relative to bills of lading came much under discussion, was in a modern case of *Caldwell and others v. Ball*, reported very much at length, and with great accuracy, in 1 Term Rep. 205. That case was fully argued at the bar, and very much debated on the bench. Amongst other things the court held, that a bill of lading is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in the bill of lading; that it is assignable in its nature, and by indorsement the property is vested in the assignee. That where several bills of lading of the same date, but of different imports, have been signed, no reference is to be had to the time when they were first signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. And where such bills of lading, though different upon the face of them,

[z] *Smith v. Lascelles*, 2 T. R. 87.

[a] *Park*, 103, 111.

are constructively the same, and the captain has acted *bona fide*, a delivery according to such legal title will discharge him from them all. But if the intention of the parties appears to have been to bind the net proceeds only, (b) in case of the arrival of the goods, an insurance made on account of the indorser after such indorsement, is good. And in the last place, (c) the plaintiff must prove that the loss happened by the very means stated in the declaration. (d)

And where a party obtains leave by consent, (e) to examine witnesses abroad, on depositions, he is not entitled to be allowed the expense of taking the depositions in the taxation of costs, though he succeed.

By stat. 31 Geo. 3. c. 4. sec. 7. (and 32 Geo. 3. c. 52.) for regulating the *African* slave-trade, it is necessary that the certificate of the captain's having served as that act requires, should be attested by the owner or owners of the ship or ships in which the service was performed; and the assured cannot recover on a policy on a ship whose captain has not such a certificate. (f)

[b] *Hibbert v. Carter*, 1 Term Rep. 745.

[c] *Kulen and Kemp v. Vigne*, 1 *ibid.* 504.

[d] *Cary v. King*, Ch. Temp. Hardw. 504.

[e] *Taylor v. The Royal Exchange Assurance Company*.

8 East 393.

[f] *Farmer v. Legg*, 7 Term Rep. 186.

Sentences of foreign courts of Admiralty are frequently brought forward in insurance causes. It may be requisite therefore, to remark, that wherever the ground of such sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties, or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding; and the courts here will not take upon themselves, in a collateral way, to review the proceedings of a forum, having competent jurisdiction of the subject-matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned, or if there be colour to suppose that the court abroad proceeded upon matter not relevant to that in issue between the parties at law, there, evidence will be allowed in order to explain; and if the sentence upon the face of it be manifestly against law and justice, or be contradictory, the insured shall not be deprived of his indemnity; because any detention, by condemnation under particular circumstances or decrees, (g) which contravene or do not form a part of the law of nations, (h) is a risk within the policy of insurance.

A sentence of a foreign court of Admiralty is only conclusive here, in an action on a policy of in-

[g] Park, c. 18, ad fin.

[h] Dougl. 554, 574. Bernardi v. Motteux.

surance, as to the express ground of the sentence,(i) but not as to any of the premises (noticed in the consideration part of the sentence) that led to the adjudication.

A sentence of condemnation of a British ship (which had been captured by a French privateer, and carried into Bergen in Norway by the French Consul at Bergen) is an illegal sentence, and if after such a sentence the owner re-purchase his ship at a public auction at Bergin,(k) he cannot recover the money so paid, from the underwriters.

An assured upon an American ship and cargo, provided with such a passport as is required by the treaty between America and France, and with all other usual American papers and documents, is entitled to recover against an underwriter of a policy on such ship or goods in case of a capture by a French privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a French court of admiralty; such sentence proceeding on the ground of a breach of French ordinances,(l) requiring certain particulars to be observed in respect of the ship's documents beyond what was necessary by the treaty.

[i] *Christie v. Secretan*, 8 Term Rep. 192.

[k] *Havelock v. Rockwood*, 8 Term Rep. 268.

[l] *Price v. Bell*, 1 East 663.

A sentence of condemnation by a French court sitting in Spain, of a prize taken by a French privateer and carried in there, (Spain being then a belligerent ally of France in the war against Great Britain) is valid; and such condemnation proceeding on the ground of the property being *enemy's and British*, is conclusive in an action on a policy against the underwriter by the assured, *(m)* who had insured it as Danish, which in fact it was, Denmark being then neutral.

The agent or broker of the assured having shewn to the underwriter the protest of the captain, *(n)* stating the circumstances of the loss of the ship insured, and demanding payment, it was held by the court, on a motion for a new trial, that the delivery of this paper to the defendant did not entitle him to read it, as evidence of the facts contained in it; though had the captain been called to give a different account of the loss from that contained in the protest, it might have been produced to shew that *he* was not worthy of credit; but it could not be read on the part of the defendant to prove any fact in the case.

So in an action on a policy on the ship, *(o)* a condemnation of the vessel by a court of Vice-admiral-

[*m*] *Oddy v. Bovill*, 2 East 473.

[*n*] *Senat v. Porter*, 7 T. R. 158.

[*o*] *Wright v. Barnard*, *Sittings after Mich.* 1798.

ty abroad for insufficiency, after a survey had upon oath, was offered in evidence by the underwriters, to prove that there were defects in the ship, from which want of sea-worthiness at a prior time was meant to be inferred; but lord Kenyon rejected the sentence, as *evidence of the facts contained in it*, though he admitted it to be read to prove the mere fact of a condemnation having taken place; and this, notwithstanding an order of the court of Exchequer, directing that it should be admitted in evidence.

Where an instrument is produced at the trial by one of the parties, (p) in consequence of notice from the other, which when produced, appeared to have been executed by the party producing it, and third persons, and to be attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it.

I. 5. *Of Re-assurances and double Insurances.*

Re-assurance is a contract which the first underwriter enters into in order to relieve himself from those risks which he has previously undertaken, by throwing them upon other underwriters, who are called re-assurers. It is a species of contract still

countenanced in most parts of Europe, and which was admitted in England till it was found productive of glaring and enormous frauds, which rendered it destructive of the benefits it was originally intended to promote. The legislature therefore, found it necessary to interpose by an act which permitted only such contracts of re-assurance as tended to the advancement of commerce, or the real benefit of the individual.^(q) For this purpose the statute declares it unlawful to make re-assurance "unless the assurer or "underwriter should be *insolvent*, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, or assigns, may "make re-assurance to the amount before by him "assured, expressing in the policy that it is a re-assurance;" which statute extends to re-assurance on *foreign* ships previously insured by foreign underwriters.^(r)

In France, as in other countries, it was formerly allowed to the insured to insure the solvency of the underwriter; but this practice is not allowed in England, and though no express notice is taken of it in the above statute,^(s) it seems that such a policy would be looked upon as a wager policy, and treated accordingly.

Double insurance is totally different from re-assurance. It is where the same man is to receive

[q] 19 Geo. 2. c. 37. sec. 4.

[r] *Andree v. Fletcher*, 2 Term Rep. 161. [s] See post III. 5.

[I. 5.] *Of Re-assurances and double Insurances.* 65

two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property.(t) It makes no difference whether such insurances are both or either made in the name of the insurer,(u) or of another person if actually made on his account.

These double insurances are not void. The person insuring, however, shall receive only one satisfaction to the real amount of his loss, and no more, which he may recover against which set of underwriters he pleases. And when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured.(x) But though a double insurance cannot be wholly supported, so as to enable a man to recover two-fold satisfaction, yet various persons may insure various interests on the same thing, and each to the whole value,(y) as the master for wages, the owner for freight, one person for goods, and another for bottomry,(z) &c. In which case the defendants were expressly apprised that there might probably be another insurance than that which they underwrote.

[t] 1 Burr. 496. [u] Park 285.

[x] 1 Black. Rep. 416. 1 Burr. 492.

[y] Godin v. London Assurance Company, 1 Burr. 489.

[z] 1 Black. Rep. 103.

Formerly if an underwriter became a bankrupt after he had subscribed the policy, and before a loss happened, the insured was not entitled to a dividend of the bankrupt's estate. This being found a heavy inconvenience, and a discouragement to trade, parliament was obliged to interpose, and to alter the law in this respect.(a) ●

[a] See the 19 Geo. 2. c. 32. sec. 2.

II. OF LOSSES UNDER SUCH POLICIES.

1. *Of total Loss by Peril of the Sea.*

THE loss must always be a *direct and immediate consequence* of the peril insured, and not a remote one, (a) in order to entitle the insured to recover.

A total loss in insurances does not always mean that the property insured is irrecoverably lost or gone; but that, by some of the perils mentioned in the policy it is in such a condition as to be of little use or value to the insured, and to justify him in abandoning his right to the insurer, (b) and calling upon him to pay the whole of his insurance.

The insured may call upon the underwriter for a total loss, if the voyage be absolutely lost, or not worth pursuing; if the salvage be high, (c) or half the value; or if further expense be necessary, and the underwriter will not engage at all events to bear that expense.

In a total loss properly so called, the prime cost of the property insured, or the value in the policy must be paid by the underwriter, according to his

[a] 1 Term Rep. 130. n. (a.)

[b] Park 98, 143.

[c] *Hamilton v. Mendes*, 2 Burr. 1198, 1 Black. Rep. 276.

proportion of the insurance. Where a policy is a *valued* one, and a total loss ensue, it is only necessary to prove that the goods were on board at the time of the loss, (d) unless the defendant can shew that the plaintiff had only a colourable interest, or has greatly overvalued the goods; but, where it is an open policy, (e) the value must be proved, as it must in case of a *partial loss* on a *valued* one.

Questions as to losses by *perils of the sea* have very seldom arisen; the general rule is, that every accident happening by the force of the wind or waves, by thunder and lightning, by driving against the rocks, or by the stranding of the ship, or any other violence that human prudence could not foresee, (f) nor human strength resist, is to be considered as a peril of the sea, and for such losses the underwriter is answerable.

Although the courts in this case, as in all others, will endeavour to give effect to this species of contract, by a liberal and equitable construction; yet they will be cautious not to extend the principle so far as to say that the acts of the parties shall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and see that the loss, which has proved to have happened, is

[d] See ante, I. 4. [e] Park 103, 111.

[f] Park 61. 1 Show. 323. 2 Rolles Abr. 248. p. 10. Comb. 56.

really one of those risks against which the underwriter has insured. (g)

An action was brought to recover the value of certain slaves insured by the policy; the facts were, that the captain of the ship missed the island of Jamaica, for which he was bound, and their water runningshort, some of the slaves were thrown overboard to preserve the rest, and the declaration stated the loss to have happened by perils of the sea. (h) But it was held, the mistake of the captain cannot be called a peril of the sea.

A ship which is never heard of after her departure (i) shall be presumed to have perished at sea. (k) In *England* no time is fixed within which payment of loss may be demanded from the underwriter, in case the ship is not heard of. But a practice prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any port of Europe, or within twelve, if for a greater distance. This latter term, however, seems too short with respect to India voyages, (l) and is extended in Spain to a year and a half, and formerly in France to *two* years, and in case of an adjustment on such supposed loss, if the ship arrives, the

[g] Park 62.

[h] *Gregson v. Gilbert*, Pasch. 23 Geo. 3. Park 63.

[i] *Green v. Brown*, 2 Stra. 1199.

[k] *Newby v. Read*, Sittings after Mich. 3 G. 3. [l] Salk. 22.

underwriter may recover back the money paid by him. (m)

Insurance on a voyage from *C* to *D* on a representation that the ship was first to sail from *A* to *B* and from *B* to *C*; (n) the voyage from *A* to *B* was performed, but that from *B* to *C* being unavoidably prevented, the ship returned to *A*, from thence proceeded immediately to *C*, and in performing the voyage from *C* to *D* was lost; and this was held a good commencement of the voyage insured.

Upon an insurance on slaves against perils of the sea, (o) their death by failure of sufficient and suitable provision occasioned by extraordinary delay in the voyage, or from bad weather, is not a loss within the policy, but a loss by natural death, which cannot be insured against since the 30 Geo. 3. c. 33. sec. 8. and 34 Geo. 3. c. 80. See also 39 Geo. 3. c. 80. sec. 24.

In an action on a policy of insurance at and from St. Bartholomew to the coast of Africa, (p) and during her stay and trade there and back to St. Bartholomew, it was attempted, under a count for a loss by *perils of the sea*, to recover for a total loss of the

[m] Park 64.

[n] Driscoll v. Passmore, 1 Bos. & P. 200.

[o] Tatham v. Hodgson. 6 Term Rep. 656.

[p] Rohl v. Parr, Guildhall Sitt. after Hill. 1796.

ship, which appeared to have been destroyed by a species of worms which infest the rivers of Africa. An intelligent merchant swore, that he had known *many instances* of this species of loss, but that the underwriters had invariably refused to pay. Lord Kenyon, upon this evidence and the unanimous declaration of the jury, decided that it was not a loss by perils of the sea.

Where a ship insured arrived in port a mere wreck,(g) and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards, she sunk ; held, that the assured might recover as for a total loss, although her cargo was saved and brought to a profitable market.

II. 2. *Of Losses by Capture.*

Capture, as applied to the subject of marine insurances, is a taking of the ships or goods belonging to the subjects of one country, by those of another, when in a state of public war.(r) As, between the underwriter and the insured, a ship is to be considered as lost by the *capture*.(s) though she be never

[g] Shaw v. Felton, 2 East 109.

[r] Park c. 4.

[s] 2 Burr. 694. 1st point in Goss v. Withers.

condemned at all, nor carried into any port or fleet of the enemy; and the underwriter must pay the loss actually sustained. If, therefore, either before or after condemnation she be retaken, and the owner have paid salvage, the insurer must pay the loss sustained in consequence.

No capture by the enemy can be so total a loss as to leave no possibility of recovery.^(t) If the owner himself should retake at any time he will be entitled;^(u) and if any English ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution on stated salvage (see post VIII.) In all such cases, if the loss be paid by the underwriter before the recovery, he stands in the place of the insured,^(x) and will be entitled to the benefits of the restitution. This chance does not, however, suspend the demand for a total loss upon the insurer; but justice is done by putting him in place of the insured, in case of a recapture.

Before the stat. 19 Geo. 2. c. 37. which abolished wager policies, the recapture had a considerable effect upon the contract of insurance,^(y) and several cases were determined on that question. But

[t] 2 Burr. 696.

[u] 29 Geo. 2. c. 35. sec. 24. 33 Geo. 3. c. 66. sec. 42.

[x] 2 Burr. 683. Park 66.

[y] 10 Mod. 77. 2 Burr. 695. Com. 360. 1 Wils. 191. 2 Stra. 1250. Park 73, 77.

now the contract is not at all altered between the underwriter and the insured by such an event.(z)

By the marine law of England, as practised in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or a recaptor, till there had been a sentence of condemnation.(a) And now by the statute already mentioned,(b) this right of the original owner in case of a recapture,(c) is preserved to him *for ever*, upon payment of a certain salvage from one eighth to half the value, to the recaptors. See post VIII.

A capture having been illegal,(d) but the charges and delay being great, the insured made a compromise *bona fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise.

Insurance on a voyage from *A* to *B*, from *B* to *C*, and from *C* to *A*;(e) the voyage from *A* to *B* is per-

[z] 2 Burr. 695, 1198.

[a] 2 Burr. 694.

[b] 29 Geo. 2. c. 34.

[c] See 43 Geo. 3. c. 160. sec. 39. and 45 G. 3. c. 72. sec. 7. which excepts ships fitted out for war by the enemy, not to be restored to the former owner after recapture. Continued to the end of the war.

[d] *Berens v. Rucker*, 1 Black. Rep. 313.[e] *Driscoll v. Bovil* 1 Bos. & P. 313.

formed, but that from *B* to *C* being unavoidably prevented, the ship returned to *A*; from whence the captain writes to his broker in London, requesting him to obtain the opinion of the underwriters as to his proceeding directly to *C* if the charterer should insist on it, and is answered by him, that he thinks the policy at an end: at the instance of the charterer the captain does proceed to *C*, and on his return from thence to *A* the ship is captured; held, that the voyage insured was never abandoned.

It may, however, be proper to observe, that there appears to be no settled and uniform rule established in practice among nations, as to the precise period, at which property is diverted by capture. By some writers, and in some nations, this has been held to take place after a possession of twenty-four hours; by others not until the prize had been carried into port, an expression of very doubtful meaning as applied to maritime warfare.

The present learned Judge of the Court of Admiralty has said, that in his apprehension, (g) "by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary, and that a neutral purchaser in Europe during war, looks to the legal sentence of condemnation as one of the title deeds of a ship, if he buys

(g) *Meek v. Meek*, 1 Rob. A. R. 3.

(h) 1 Rob. A. R. 3.

“the prize vessel.” Such a sentence is thought necessary in this country, to divest the title of the original owner, and give a valid title to a purchaser under captors ;(*h*) and upon this principle our courts of law have ruled a regular sentence of condemnation of neutrals, to be conclusive evidence against a warranty of neutrality. But by the marine law received and practised in England, there is no change of property in case of capture, and by the several acts of parliament above mentioned in case of recapture, the *jus postliminii*(*i*) continues for ever. However the change of property is not at all material as between the insurer and assured, upon policies of real interest, which are the only policies that can now by law be effected.

Yet it may be useful to observe that states in alliance with the captors, and at war with the country to which a captured ship belongs, (*k*) are considered as forming one community with the captors ;(*l*) and a prize carried into such a state may be legally con-

[*h*] See ante I. 3. *Geyer v. Aguilar*. *Christie v. Secretan*. *Oddy v. Bovil*. *Bolton v. Cladstone*. *Baring v. R. E. Ass. Comp.*

[*i*] *Jus postliminii*, a right in the original owners to claim after recapture, as applied in maritime law, derived from the *Roman Jus postliminii* which restored the citizen of Rome who had been made a slave to his threshold ; i. e. his original *franchise*, and therefore metaphorically used in our Admiralty Court, as a resumption of an original inherent right to a recaptured British ship in the original legal owners.

[*k*] *The Betsey*, Kruger, 2 Rob. A. R. 210. n.

[*l*] *Oddy v. Bovill*, 2 East 473.

demned,(*m*) either there by a consul belonging to the nation of the captors or in the country of the captors; which condemnation would be conclusive against a warranty of neutrality in our courts of law.

On this head it may likewise be proper to state, that it is unlawful(*n*) for any British subject to ransom, or to enter into any contract for ransoming any ships belonging to any British subjects, or any goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his subjects.(*o*)

All contracts which shall be entered into, and all bills, notes, and other securities which shall be given by any person for ransom of any ship, or of any goods on board the same, shall be absolutely void.(*p*)

If any person shall ransom, or enter into any contract for ransoming, any such ship, or any goods on board the same, such person shall forfeit 500*l*. which may be sued for by any one ;(*q*) and by a subsequent statute,(*r*) no captured vessel, goods, &c. belonging to his Majesty's subjects, shall be ransomed under similar penalties, which statute was

[*m*] *The Christopher*, 2 Rob. A. R. 209.

[*n*] 22 Geo. 3. c. 26.

[*o*] Sec. 1.

[*p*] Sec. 2.

[*q*] Sec. 3.

[*r*] 43 G. 3. c. 160. sec. 34, 36.

repealed by 45 G. 3. c. 72. and re-enacted by sec. 16, 17 and 18. of the latter statute, and continued to the end of the war.

Clauses exactly similar to those contained in the 22 Geo. 3. c. 25. were inserted in the prize act,^(s) the continuance of which was limited by the duration of the then war with France, and continued by a subsequent statute.^(t) Commanders of British privateers, were also by that act prohibited from ransoming prizes taken by them from the enemy, under forfeiture of their letters of marque, and imprisonment, in the discretion of the Court of Admiralty. It would follow as a necessary consequence, that no sum paid on such account could be recovered from the underwriters.

Upon this principle the following decision lately took place :^(x) The ship *Themis* was insured for twelve months, and during that period was captured and carried into Bergen in Norway, and there condemned by the French consul. After this sentence, the ship was put up to publick auction at Bergen, by the publick officer of the court of Denmark, having been previously advertised, and was re-purchased by the agent of the plaintiff; and for this re-purchase money the plaintiff insisted, (if not en-

[s] 33 Geo. 3. c. 66.

[t] 43 G. 3. c. 160. sec. 33.

[x] *Havelock v. Rockwood*, 8 Term Rep. 268.

titled to recover as for a total loss) he was at all events entitled to a verdict.

The court after hearing two arguments, were unanimously of opinion, that as the sentence of the French consul, in a neutral country, was contrary to the law of nations, and void, the property never was divested out of the original owner ; and that therefore money paid for the re-purchase was in the nature of a ransom. The ransom acts are remedial laws, and in the construction of such acts, it is the rule to extend the remedy so as to meet the mischief ; and the legislature intended to prevent such a transaction as the present taking place, because it would take away the chance of recapture. The circumstances of this being done by an *agent* at an *auction*, and *on land*, were deemed immaterial, the acts of parliament not having described at what places, or in what form, a ransom is prohibited ; but having prohibited ransom in general terms, the case was thought to come within the mischiefs against which those statutes were meant to guard.

II. 3. *Of Losses by Detention of Princes.*

On questions of detention not much difficulty has arisen ; the underwriter by express words undertakes to indemnify against all damages arising from

the arrests, restraints, and detainment of kings, princes, or people.(a)

Under these terms, in a policy, *detention* is said to be an arrest or embargo in time of war, or peace, laid on by the public authority of a state. And, therefore, in case of an arrest, or embargo by a prince, though not an enemy, the insured is entitled to recover against the underwriter.(b)

In case of detention by a foreign power, which in time of war may have seized a neutral ship, in order to be searched for enemy's property,(c) the costs and charges consequent thereon must be borne by the underwriter. But a detention for non-payment of customs, or for navigating against the laws of those countries where the ship happens to be, shall not fall upon the underwriter;(d) and in that case it was observed by Buller J. that detention by particular ordinances which do not form a part of the general law of nations, is a risk within a policy of insurance.(e) It is an undecided question, whether a detention by the governing power of the country to which the ship belongs,(f) is a peril within the policy, though it seems that it is. But if an armed

[a] Park 78.

[b] 2 Burr. 696.

[c] Sallouci v. Johnson, B. R. Hil. 25. G. 3.

[d] 2 Vern. 176. [e] Vide supra.

[f] Green v. Young, Ld. Raym. 840. 2 Salk. 444.

force board a ship, (*g*) and take part of the cargo, the underwriters are not liable, on a count stating the loss to be by *people* to the plaintiffs unknown; (*h*) for people in the policy means the governing power of the country.

In all cases of losses by detention before the insured can recover, he must abandon to the underwriter whatever claims he may have to the property insured. (*i*)

A policy of insurance on a ship and stores "at and from a port" in a foreign country, (*k*) in the common form against arrests of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port. And if the embargo continue, the assured may abandon, and recover as for a total loss.

Qu. the effect of an embargo by this country laid on a ship insured here? (*m*)

In this case, (*n*) it was held, by the court of King's Bench, that an embargo only suspended, but did not dissolve the contract between the parties.

[*g*] And see Park 81. n. (a.)

[*h*] Nesbitt v. Lushington, 4 Term Rep. 783.

[*i*] Park 82.

[*k*] Rotch v. Edie, 6 Term Rep. 413.

[*m*] Rotch v. Edie, 6 Term Rep. 422.

[*n*] Hadley v. Clarke, 8 Term Rep. 239.

A ship-owner having first insured his *ship* with *A*, &c. and his *freight* with *B*, &c. for a certain voyage,^(o) and having notice of an embargo laid on the ship in a foreign port, abandons the ship and freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss of both; first undertaking by a memorandum on the *ship* policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the *freight* policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured; held, that however the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship, yet that the assured, who had received the freight from the shippers of goods, was at all events liable, on his express undertaking, to pay it over to the underwriters on freight; and that, without deducting the expenses of provisions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters or ship afterwards.

[o] *Thompson v. Rowcroft*, 4 East. 34.

A foreign prince, (p) under pretence of precaution against a supposed act of aggression of our government, made a hostile seizure of British ships in his ports, (q) and imprisoned our seamen on shore; and after six months they were released, and resumed and concluded their voyage, and the owners received their freight; held, that such seizure, however hostile in the manner, so far partook of the nature of an *embargo* in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages even during the time of such detention and imprisonment. But even considering it as a temporary capture, yet, like the case of a capture and recapture, the mariner was still entitled to his wages; and here freight for the voyage was ultimately earned.

II.4. *Of Loss by Barratry of the Master and Mariners.*

The derivation of the word *barratry* is very doubtful, it comes most probably from the word *barratrare*, to cheat (r). It may be thus defined: any act of the master or mariners of a criminal nature, or which is grossly negligent, tending to their own benefit, to

[p] Beale v. Thompson, 4 East 546.

[q] S. P. in Johnson v. Broderick, ib. 566.

[r] Cowp. 154.

the prejudice of the *owners of the ship*, and without their consent or privity.(s)

It is barratry in the master to smuggle on his own account.(t) And in *Robertson v. Ewer*, Buller J. seemed to think the breach of an embargo was an act of barratry in the master. But if the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. Some question has been made in certain cases, who shall be considered as owner? And it has been determined, that if the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act without *his* privity, though with the knowledge of the original owner, it is barratry.(u)

An act of the captain *with the knowledge of the owners of the ship* though without the privity of the owner of the goods, who happened to be the person insured, is not barratry,(x) as that crime can only be committed *against the owner of the ship*, and without his consent. And if the master of the ship be also the owner, he cannot be guilty of barratry.(y)

[s] *Knight v. Cambridge*, 1 Stra. 581. *Stamma v. Brokin*, 2 ibid. 1173. *Vallejo v. Wheeler*, Cowp. 143. 1 Term Rep. 323.

[t] Cowp. 143. *Lockyer v. Offley*, 1 T. R. 252. *Havelock v. Hancel*, 3 ibid. 277. on demurrer, 1 ibid 127.

[u] Cowp. 143, 154.

[x] *Nutt and others, assignees of Hague v. Bourdieu*, 1 T. R. 323. [y] *Park* 94.

In an action by the assured of goods, against the underwriters for a loss by the barratry of the master, proof that the person described in the policy as master, and who was treated with, and acted as such; carried the ship out of her course for fraudulent purposes of his own, is *prima facie*, sufficient to entitle the plaintiff to recover, without shewing negatively that he was not the owner,(z) or affirmatively that another person was.

It is not necessary in order to make the underwriters liable, that the loss should happen *in the very act of barratry*; for, in case of a deceitful deviation, the moment the ship is carried from its proper track, with an evil intent barratry is committed; but the loss in consequence of the act of barratry, must happen *during the voyage insured(a)*, and within the time limited for the expiration of the policy.

The underwriters by express words, undertake generally for the barratry of the master and mariners, even though the master is appointed by the insured himself;(b) a circumstance peculiar to the insurance law of England.

If a ship take a prize, and instead of proceeding on her voyage, the captain is forced to return to port

[z] *Ross v. Hunter*, 4 T. R. 33.

[a] 1 T. R. 252. 4 *ibid.* 33. Cowp. 143. Park 84, 90.

[b] Park 85.

with the prize, against the orders of his owners, the captain is justified by necessity(*c*), and it is not barratry, because not done to defraud the owners.

But in an appeal from the East Indies, heard before the lords of the privy council, at the Cockpit, Sir R. P. Arden, the Master of the Rolls, in observing upon the above case of *Elton v. Brogden*, said he thought it must be ill reported in Strange; for, upon the facts stated, there could be no doubt, but that the *mariners* had committed barratry; and he was therefore inclined to think, as lord Mansfield appeared to have done, in commenting upon this case in that of *Vallejo v. Wheeler*, that the policy must have been special, probably not including barratry of the mariners.(*d*)

Barratry in the master is severely punished by the laws of foreign nations; and several statutes have been passed to prevent these crimes in our own country. The statute inflicted the penalty of felony,(*e*) without benefit of clergy, on any captain, master-mariner, or officer belonging to any ship, who shall wilfully burn or destroy her, to the prejudice of the owner, or any merchant lading goods thereon.(*f*) This was extended by a subsequent statute to owners and others guilty of those acts, to the prejudice of

[*c*] *Elton v. Brogden*, 2 Stra. 1264.

[*d*] *De Frise v. Stephens*, 1 July 1800.

[*e*] 1 Ann. st. 2. c. 9. [*f*] 12 Ann. st. 2. c. 18.

the *underwriters* as well as merchants ;(*g*) and a later statute still further enlarges it to all such persons guilty *with intent* to prejudice underwriters or owners. The above acts are by a subsequent statute enforced in Scotland.(*h*) Provisions are made, that if the offence be committed within the body of a county, the offender shall be tried in a court of common law ; if upon the high seas, he shall be tried according to the directions of the 28 Hen. 8. c. 15.

But, in consequence of a recent occurrence,(*i*) it was determined by all the Judges of England, “ that “ the Admiralty have no jurisdiction to try offenders on the stat. 11 Geo. 1. c. 29. for procuring “ the destruction of a ship of which they were owners, there being no evidence of any act of procurement done upon the high seas within the Admiralty jurisdiction, but only on shore, within the “ body of a county :” Wherefore, the provisions of the said act,(*k*) respecting the casting away or destroying ships, or procuring the same to be cast away or destroyed, &c. are, by a recent statute,(*l*) made felony, without benefit of clergy.

Barratry is any fraudulent or criminal act against the owners of ship or goods by the master or mari-

[*g*] 11 Geo. 1. c. 29. [*h*] 29 Geo. 3. c. 46.

[*i*] Case of Easterby and Macfarlane, tried at Admiralty Sessions, 1802. See Addenda per East's pl. of the crown, xxvi.

[*k*] 11 Geo. 1. c. 29. sec. 5, 6, 7. [*l*] 43 Geo. 3. c. 113.

ners,(*m*) in breach of the trust reposed in them, and to the injury of the owners ; although it may not be done with intent to injure them, or to benefit at their expense the master or mariners. And therefore, where a master had general instructions to make the best purchases with dispatch, this would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply compleated there ; but such act, in consequence of which the ship was seized and confiscated, is barratrous.

So it was held, that “ *fraud was barratry,*” and *if the master sail out of port, without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry.*(*n*) As is some breach of trust in the captain *ex maleficio*.

Before we dismiss this article, it may be necessary to observe, that the captain of any merchant ship under convoy,(*o*) who shall wilfully disobey the signals or instructions of the commander of the convoy, or deserting the convoy without notice or leave, shall be subjected to prosecution in the Admiralty Court, there to be sentenced to a fine not exceeding 500*l*. and imprisonment for not more than one year.

[*m*] *Farle and others, v. Rowcroft*, 8 East 126.

[*n*] *Knight v. Cambridge*, *ib.* 135. M. S. note (b) in argument of *Stamma v. Brown*, *ib.* 136.

[*o*] 33 Geo. 3. c. 66. sec. 8.

It has been held by the court of King's Bench, (p) that if the captain of a ship, contrary to the instructions of his owner, cruize for and take a prize, and the vessel is afterwards lost in consequence of it, he is guilty of barratry. For whatever is done by the captain to defeat or delay the performance of his voyage, is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of the owners, yet if he acted contrary to his duty to them, it is barratry.

It has been contended, (a) that if a vessel deviated from the voyage insured, through the ignorance of the captain, it amounted to barratry, though the jury had expressly found that there was no fraud. But the court of King's Bench, after considerable argument, were unanimously of opinion, that there must be fraud to constitute barratry, and that the jury, by negating fraud, had in truth, by that finding, negated barratry.

II. 5. *Of Losses by Stranding.*

Questions on this subject have rarely occurred, as the mere stranding of the ship, unless attended by a total loss, would only subject the underwriter to an average or partial loss; but as there are some goods

[p] *Moss v. Byrom*, 6 T. R. 379.

[a] *Phyn v. The Royal Ex. As. Com.* 7 T. R. 505

of a perishable nature, when they are damaged by such natural and inherent principles of corruption in themselves, the underwriters, by the ordinances of most countries, are held discharged. The underwriters in London therefore, have, by express words inserted in their policy, declared, that they will not be answerable for any partial loss happening to *corn, fish, salt, fruit, flour, and seed*, unless it arise, by way of general average, or in consequence of the ship being stranded.

This clause was introduced by the underwriters to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of those commodities, which are above enumerated. This form was formerly used by the two insurance companies as well as private insurances, till the year 1754, where a ship having been stranded, and got off again, the insured recovered a small partial loss against the London Assurance Company, since which period the companies have left out the words, "or the ship be stranded;"^(b) and are now only liable, in cases of a general average; but the old form is still retained by private insurers.

Upon this clause there have been several determinations, in most of which it was held,^(c) that the underwriters could in no case be answerable for a

[b] *Cantillon v. The Lond. As. Comp.* cited in 3 Burr. 1553.

[c] *Wilson v. Smith*, 3 Burr. 1550.

partial loss on such commodities; (d) and that no loss should be deemed a total one, but the absolute destruction of the thing insured; (e) for that, while it remained, though perhaps wholly unfit for use, no loss had happened within the meaning of the memorandum. (f) *Corn* too, was deemed a general term, which includes peas, beans, and other species of grain.

But it has been since held, that if an insurance be effected on fruit, and the policy contain the usual memorandum, (g) "corn, fruit, &c. warranted free from average, unless general, or the ship be stranded," and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the seas, though no part of the loss arise from the act of stranding.

In a case of a ship running on some wooden piles, (h) four feet under water, erected in Wisbeach River, about nine yards from the shore, but placed there to keep up the banks of the shore, and lying on such piles, till they were cut away, was a stranding within the policy, so as to subject the underwriter to an average loss on corn, and the jury found accordingly.

[d] *Cocking v. Fraser*, Sittings East. 25 G. 3. cor. Buller. J.

[e] *M'Andrews v. Vaughan*, Sittings after Hil. 1793.

[f] *Mason v. Skurray*, Sittings after Hil. Term, 1780, at Guildhall. [g] *Burnett v. Kensington*, 7 Term Rep. 210.

[h] *Debson v. Bolton*, Sittings after Easter T. Park 4. edit. iii. iv.

And in a case where the ship in her voyage from Amsterdam to London,⁽ⁱ⁾ laden with corn, struck on a sand bank in the mouth of the Thames, but got off soon after with little damage; it was held, that the plaintiff could recover an average partial loss for the damage which the cargo had received by reason of such stranding, and the jury found a verdict for the plaintiff accordingly.

Where it appeared that a ship laden with wheat^(a) was forced by stress of weather into *Elly* Harbour in *Ireland*; and there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove upon a reef of rocks where she was *stranded*, but plaintiff could not recover for such part of the loss as was applicable to the stranding, as no count was laid in the declaration applicable to *stranding*.

A question which was much agitated in Westminster Hall, whether the words *unless stranded* were to operate as a condition, so as to allow the assured to recover for a partial loss of the commodity, if that event happened, though it could be shewn demonstrably that no part of the loss had arisen immediate-

[i] Page v. Thompson, tried before Sir James Mansfield, at Guildhall, Sittings after Tr. T. 1805. in MS.

[a] Nesbitt v. Kensington, 4 T. R. 783.

ly from the act of stranding. Lord Kenyon in a case before him at *nisi prius*, (b) upon this subject, had been of opinion, that as the general mode of constructing deeds, to which there are exceptions, was to let the exception controul the instrument, as far as the words of it extend, and no further; and then upon the case being taken out of the letter of the exception, the deed operates in its full force; so the stranding of the ship put fish in the same condition as any other commodity not mentioned in the memorandum; (c) for otherwise there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing the memorandum intended to prevent.

II. 6. Of General or Gross Average.

The principle of this general contribution is known to be derived from the ancient laws of Rhodes, (d) being adopted into the Digest of *Justinian* with an express recognition of its origin. The wisdom and equity of the rule will do honour to the memory of the state from whose code it has been derived, as long as maritime commerce shall endure. The principle of the rule has been adopted:

[b] *Bowring v. Elmslie*, Sitt. after Trin. 1790.

[c] *Park* 115.

[d] *Leg. Rhod. s. 2. art. 9.*

by all commercial nations, but there is no principle of maritime laws that has been followed by more variations in practice. The modern ordinances of the several continental states of Europe differ from each other in many particulars relating to this general contribution, and the French ordinance establishes a different mode of contribution in different cases. An enumeration of these varieties would furnish little entertainment or instruction to an English reader; discordant rules rather serve to perplex the choice than to guide the judgment. The determinations of English courts of justice furnish less of authority on this subject than on any other branch of maritime law; there being only three reported cases of questions between the parties liable to contribution in the first instance, and very few of the questions between the parties so liable and the insurer, from whom indemnity has been sought.

The rule of the Rhodian law is this : (e) " If goods
" are thrown overboard in order to lighten a ship,
" the loss incurred for the sake of all, shall be made
" good by the contribution of all." The goods must
be *thrown* overboard; the mind and agency of man
must be employed: if the goods are forced out of
the ship by the violence of the waves, or are des-
troyed in the ship by lightning or tempest, the mer-

[c] Dig. 14. 2, 1. "*Lege Rhodia caveturæ, ut, si levana na-
vis gratia jactus mercium factus sit, omnium contributione sar-
ciatur, quod pro omnibus datum est.*"

chant alone must bear the loss. They must be thrown overboard *to lighten the ship*; if they are cast overboard by the wanton caprice of the crew or the passengers, *they*, or the master and owners for them, must make good the loss. The goods must be thrown overboard *for the sake of all*, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped, or received the goods; but because at a moment of distress and danger their weight or their presence prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, &c. or is labouring on a rock &c. or when a pirate or an enemy pursue, gains ground, and is ready to overtake, no measure that may facilitate the motion and passage of the ship can be really injurious to any one who is interested in the welfare of any part of the adventure, whether merchant, mariner, or underwriter, who must of course sanction every measure adopted for the preservation of the ship and cargo; (*f*) and if the ship, and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, (*g*) and therefore all must

[*f*] *Mouse's Case*, 12 Co. 63. mentioned also in *Bird v. Astock*, 2 Bulst. 280. [*g*] *Park* 124. 6. *Lex. Merc.* 2 Term R. 407.

contribute to the loss, which loss ultimately falls on the insurer.

The word *average* is applied in various senses in policies of insurance, which in this above all other particulars are indistinct and confused. It is used as well for a contribution to a general loss as for a particular partial loss.^(h) On the present occasion, however, we shall confine our observations to general or gross average.

If goods be put on board a lighter to enable the ship to sail into harbour, and the lighter perish, the owners of the ship and remaining cargo are to contribute; but if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute, the lightening of the ship being an act of deliberation for the general benefit,⁽ⁱ⁾ but the saving of the lighter being accidental, and no way proceeding from a regard for the whole.^(k)

Diamonds and jewels, when a part of the cargo, must contribute according to their value; but ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, bottomry or *respondentia* bonds, and the wages of the sailors, shall not any of them contribute.^(l)

[h] 3 Burr. 1555. [i] 2 Magens 96, 283.

[k] Molloy tit. Average, 7, 12.

[l] De Leg. Rhod. s. 2. art. 8. Oler. art. Wisb. art. 20. Molloy, l. 2. c. 8. sec. 4.

Where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and provisions of the workmen hired for the repairs, are a general average.(*m*)

The French ordinance in express terms,(*n*) excludes from the benefit of general average goods stowed upon the deck of the ship, and the same rule prevails in practice in this country.(*o*) Goods so stowed may in many cases obstruct the management of the vessel, and except in cases where usage may have sanctioned the practice, the master ought not to store them there without the consent of the merchant.

In order to fix a right sum on which the average or contribution may be computed, and which in general is not made till the ship's arrival at her port of discharge, it is to be considered, what the whole ship, freight, and cargo would have produced net, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportionable part of the loss.(*p*) According to the custom of merchants in England, the goods thrown

[*m*] *Da Costa v. Newnham*, 2 T. R. 407.

[*n*] Liv. 3. tit. Du. Jet. art. 13.

[*o*] *Myer and others, v. Vander Deyl*, *Sittings at Guildhall*, Dec. 1803. *Backhouse and another v. Ripley*, tried before *Chambre J.* a short time before; *Abbott*, part III. c. VIII. 323.

[*p*] 1 Mag. 69.

overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges being first deducted.

Supposing therefore a general average to be settled upon the ship's arrival at the port of destination,^(g) according to the principles before advanced, it is necessary in the first place, to take an account of the several losses, which are to be made good by contribution; in the second place, to take another account of the value of all the articles that are to contribute, in which must be included the value of the goods, &c. thrown overboard, for otherwise the proprietors of those goods will receive their full value and pay nothing towards the loss. But as this will be most easily understood by an example in figures; suppose that it became necessary for a ship destined for Hull to cut her cable in the Downs; that the ship afterwards struck upon the Goodwin, which compelled the master to cut away his mast, and cast overboard part of the cargo, in which operation another part was injured; and that the ship, being cleared from the sands, was forced to take refuge in Ramsgate harbour to avoid the further effects of the storm.

[g] Abbett, part III. c. VIII. 328.

<i>Amount of Losses.</i>	<i>£.</i>	<i>Value of Articles to contribute.</i>	<i>£.</i>
Goods of <i>A</i> cast overboard	500	Goods of <i>A</i> cast overboard	500
Damage of the goods of <i>B</i> by the jettison	200	Sound value of goods of <i>B</i> deducting freight and charges	1,000
Freight of the goods cast overboard	100	Goods of <i>C</i>	500
Price of a new cable, anchor and mast, 300, deduct one third, 100	200	Of <i>D</i>	2,000
Expense of bringing the ship off the sands	50	Of <i>E</i>	5,000
Pilotage and port duties going into the harbour and out, and commission to the agent who made the disbursements	160	Value of the ship	2,000
Expenses there	25	Clear freight, deducting wages, victuals, &c.	800
Adjusting the average	4	Total of contributory values	£11,800
Postage	1		
Total losses,	£1,180		

Then £11,800 £1,180 £100 £10.

That is, each person will lose 10 *per cent.* upon the value of his interest in the cargo, ship or freight.

Therefore *A* loses £ 50

B ——— 100

C ——— 50

D ——— 200

E ——— 500

The owners 280

Total 1,180

which is the exact amount of the losses.

Upon this calculation the owners are to lose £280, but they are to receive from the contribution £380, to make good their disbursements, and £100 more for the freight of the goods thrown overboard, or £480 minus £280.

They therefore are actually to receive	£	200
<i>A</i> is to contribute £50, but has lost £500,		
therefore <i>A</i> is to receive	-	450
<i>B</i> is to contribute £100, but has lost £200,		
therefore <i>B</i> is to receive	-	100
Total to be actually received		<u>750</u>

On the other hand *C D* and *E* have lost nothing, and are to pay as before,

	<i>C</i> —	50
	<i>D</i> —	200
	<i>E</i> —	500
Total to be actually paid		<u>£ 750</u>

which is exactly equal to the total to be actually received, and must be paid by and to each person in rateable proportion, to be ascertained by another calculation, with which it is unnecessary to trouble the reader.

In the above estimate of losses, the freight of the goods thrown overboard is included, which appears to be proper, as the freight of these goods is to be paid, and their supposed value is taken clear of freight as well as other charges, although this article is omitted in the example proposed by Pothier,^(r) But we find it charged in an adjustment of general average given by Magens.^(s)

[r] *Traite des Avaries*, No. 133.

[s] 1 Magens 189.

In this country, which has no forum established for these matters, but in which the practice of insurance is very general, it is usual for the broker, who has procured the policy of insurance, to draw up an adjustment of the average, which is commonly paid in the first instance by the insurers without dispute, the contribution may be recovered either by a suit in equity,^(t) or by an action at law, instituted by each individual entitled to receive,^(u) against each party that ought to pay, for the amount of his share. And in the case of a general ship, where there are many consignees, it is usual for the master before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted.

An action upon promises,^(x) lies by a ship-owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.

“ In settling a gross average an estimate must be
 “ made of all the goods lost and saved, as well as of
 “ what the master shall have sacrificed of the ship's

[t] *Shepherd and others v. Wright*, Show. Parl. Cas. 18.

[u] *Marshall v. Dutrey*, Select Cases of Evid. 52.

[x] *Birckley v. Presgrave*, 1 East 220.

“ appurtenances to her preservation, and that of the
“ cargo.”(y)

And if a ship be taken by force,(x) carried into some port, and the crew remain on board to take care of and reclaim her, not only the charge of reclaiming her shall be brought into a general average, but the wages and expenses of the ship’s company during her arrest from the time of her capture, and being disturbed in her voyage.(a).

The contribution of a general average is in general not made till the ship arrive at the place of delivery ;(b) but accidents may happen which may cause a contribution before she reach her destined port. Thus when a vessel has been obliged to make a jettison, or by the damages suffered soon after sailing, is obliged to return to her port of discharge ; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average.

SMALL OR PETTY AVERAGE consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo ; such as pilotage, beaconage, &c. The term is also used for a

[y] Beawes’ Lex.Merc. fo. edit. 142.

[z] Beawes 160.

[a] 1 Magens 290.

[b] Peters v. Milligan, Sittings after Mich. 787.

small duty paid by merchants, who send goods in the ships of other men, to the master, over and above the freight, for his care and attention ; none of these charges ever falls upon the underwriter.(c)

II. 7. *Of partial Loss and Adjustment.*

Before we enter on this intricate subject, it is necessary to premise, that the contract of insurance is a contract of indemnity against loss, and not a contract for the security of gain ; it becomes necessary therefore, in cases of partial loss, to consider the mode by which such loss shall be adjusted, and in what proportion it is to be paid by the insurer. In cases of total loss no difficulty can arise in the adjustment, for the prime cost of the property insured, or the value mentioned in the policy, must be paid by the underwriter, and since the 19 Geo. 2. the constant usage has been to let the valuation fixed in the policy remain, in case of total loss, unless the defendant can shew that the plaintiff had a colourable interest only or that he has greatly overvalued the goods ; but a partial loss opens the policy. Therefore as clearness and precision are necessary upon all subjects, and more especially upon this, it will be proper to observe that when we speak of the underwriter being liable to pay, whether for total or partial losses, it must be understood that they are liable only in proportion to the sums which they have underwrit-

ten. Thus, if a man underwrites 100% upon property valued at 500% and a total loss happen, he shall only be answerable for 100% that being the amount of his subscription; if only a partial loss amounting to 60 or 70 *per cent.* upon the whole value, he shall pay 60% or 70% being his proportion of the loss, although in such cases the assured generally abandon to the underwriters who stand in the place of the assured.

The general rules as to a *partial loss*, and its consequences, were settled in the case of *Lewis v. Rucker*,^(d) from whence much of the subsequent information is drawn; but the whole of the law on this part of the subject is more intricate and perplexed than on any other question of insurance. In a recent case,^(e) it was held, that the rule by which to calculate a partial loss on a policy on goods by reason of sea-damage is, the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the *net* proceeds; it being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination.

But partial loss, when applied to the ship, means a damage which she may have sustained in the course of her voyage from some of the perils men-

[d] 2 Burr. 1167. et seq. [e] *Johnson v. Sheddon*, 2 East 521.

tioned in the policy ; when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or the greater part thereof may arrive in port. By express stipulation in the terms of the London policies, these losses do not fall upon the underwriters, unless they amount to 3*l.* *per cent.* ; but if a loss arising from a *general average* (i. e. a contribution to a general loss) should be under 3*l.* *per cent.* there the underwriter is liable. And in all cases of a partial loss, the value in the policy can be no guide to ascertain the damage ; but it becomes the subject of proof as in case of an open policy. (f)

When goods are partially damaged, the underwriter must pay the owner such proportion of the *prime cost* or value, in the policy, (or if no value is stated in the policy, then of the invoice price, with all charges and premiums of insurance) as corresponds to the proportion of diminution in value occasioned by the damage. Where an entire thing, as one hogsheaf of sugar, happens to be spoiled, if you can fix whether it be a third or fourth worse, then the damage is ascertained ; but this can only be done at the port of delivery where the whole damage is known, and the voyage is completed ; (g) and whether the price of the commodity be high or low, it equally ascertains the proportion of damage, though no regard is to be paid to the rise or fall of

[f] Park 101-3.

[g] 2 Burr. 1167.

the market, as to the sum to be paid by the insurer, which is, in either case, to be regulated only by the prime cost or invoice price. *(h)*

These rules can only apply in cases where there is a specific description of goods, but where the property is of various kinds, an account must be taken of the value of the whole, and the proportion of that as the amount of the goods lost. *(i)*

Some goods are of a perishable nature, and against the losses arising from the principle of corruption inherent in such, the underwriters of London have exempted themselves, by declaring in a memorandum contained in all their policies, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, or seed, unless it arise by way of general average, or in consequence of the ship being *stranded*, against a loss by which latter event, however, in cases of these perishable commodities, *(k)* the two insurance companies already mentioned do not undertake to be answerable.

On this clause it was formerly held, *(l)* that no loss shall be deemed total so as to charge the insurers in case of such perishable commodities, as long

[*h*] Nor is any regard to be paid to difference of exchange. See *Theflusson v. Bewick*, Sittings after Mich. 34 Geo. 3. *Espinasse*, p. 77. [*i*] *Park* 111.

[*k*] *Cantillon v. The London Ass. Com.* 3 Burr. 1553.

[*l*] *Mason v. Skurray*, Sittings after Hil. 1780. *Wilson v. Smith*, 3 Burr. 1550. *Cocking v. Fraser*, P. R. East 25 G. 2.

as the commodity specifically remains, though perhaps wholly unfit for use.

This doctrine has been since over-ruled by the cases of *Burnett v. Kensington*,^(m) and *Dobson v. Bolton*;⁽ⁿ⁾ which were decided upon the principles laid down in *Byfield v. Brown*;^(o) and although this case was determined by Lord Hardwicke prior to the introduction of the clause above-mentioned, as well as that of *Cantillon v. The London Assurance Company*,^(p) yet as the same principles were recognized by Lord Kenyon in *Bowring v. Elmslie*, (where a verdict went for the defendant, upon the ground of the ship having been fraudulently stranded) and governed the court in the decision of *Burnett v. Kensington*;^(q) and in a still more recent case,^(r) the plaintiff obtained a verdict for a partial loss on corn, occasioned by the ship stranding or striking on a sand bank, in the mouth of the Thames (although she got off with little damage) but proved leaky in consequence of such stranding, whereby the corn (or wheat) became injured. It may be now laid down as a rule, that where there is a *bona fide* stranding of the ship, the goods excepted in the memorandum are subject to a partial loss or average in the same manner as other goods are, and the underwriter becomes liable to pay such average or

[m] 7 T. R. 210. [n] See ante II. 5. p. 69. [o] 2 Stra. 1065.

[p] Cited in 3 Burr. 1553. in *Wilson v. Smith*, and 2 Mag. 385. 7 Term Rep. 216. in n.

[q] See ante. [r] *Page v. Thompson*, ante II. 5.

partial loss according to the mode of adjustment adopted in other cases.

And where after seizure by an armed mob,(s) the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered as for a general average; but for such part as, in consequence of the stranding, was damaged and thrown overboard, the insured may recover on a count, stating the loss to be by *stranding*.(t)

When the quantity of damages sustained in the course of the voyage, is known, and the amount which each insurer is to pay, is settled, it is usual for the underwriter to indorse on the policy, "Adjusted this loss at so much *per cent.*" This is called an adjustment; after which, if the underwriter refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances, the adjustment being considered as a note of hand.(u) So after judgment by default upon a valued policy, the plaintiff's title to recover is confessed,(x) and the amount of the damage is fixed by the policy. And if a loss be total at the time of the adjustment, and the insurer pay for a total loss, the insured is not obliged to refund if it should afterwards turn out to

[s] *Nesbitt v. Lushington*, 4 T. R. 783.

[t] *Burnett v. Kensington*, 2 T. R. 210.

[u] *Park* 117-8.

[x] *The llusson v. Fletcher*, Doug. 315.

be partial, but the insurer will stand in the place of the insured.(y)

II. 8. *Of Salvage and Abandonment.*

Salvage is an allowance made for saving a ship, or goods,(z) or both from the dangers of the sea, fire, pirates, or enemies; in which sense it is here used, though it is also sometimes incorrectly applied to signify the thing itself which is saved.(a) And the saver has such a property in the goods saved by his own exertions and danger, that in an action of trover, it has been held, the defendants might retain the goods till payment of the salvage.(b)

The propriety and justice of such an allowance must be evident to every one;(c) for nothing can be more reasonable than that he, who has recovered the property of another from imminent danger, by great labour, or perhaps at the hazard of his life, should be rewarded by him, who has been so materially benefited by that labour. Accordingly, all maritime states, from the Rhodians down to the present time,(d) have made certain regulations, fixing the rate of salvage in some instances, and leaving it in others, to depend upon the particular circumstances.

[y] 4 Burr. 1966. [z] Beawes' Lex Merc. 146.

[a] Park 131. [b] 1 Ld. Raym. 393. 2 Salk. 654.

[c] Kaim's Princ. of Eq. Introd. p. 6.

[d] Leg. Rhod. s. 2. art. 45, 46, 47.

The right of owners on re-capture has been already noticed; the salvage in this case is regulated by statutes,^(e) which enact, that if any prize taken from the enemy shall appear to have belonged to any of his Majesty's subjects, it shall be restored to the former owner, upon his paying, in lieu of salvage, one eighth of the value, if re-taken at any time by one of his Majesty's ships. If re-taken by a privateer, before it has been twenty-four hours in the possession of the enemy, the salvage paid to be one eighth of the value; if above twenty-four and under forty-eight hours, one fifth; if above forty-eight hours and under ninety-six hours, a moiety or one half part thereof; or if the ship so retaken shall have been fitted out by the enemy as a ship of war, the salvage is in all cases settled at a moiety.^(f)

But in the case of wreck or derelict at sea, the law of England, like the law of some other countries,^(g) has fixed no positive rule or rate of salvage, but directs only as a general principle that a reasonable compensation shall be made.

In the case of a derelict becoming the property of the crown, it was formerly the settled practice of the court of Admiralty to give a moiety to the

[e] 13 Geo. 2. c. 4. sec. 18. 29 Geo. 2. c. 34. sec. 24.

[f] See 43 G. 3. c. 160. sec. 39. and 45 G. 3. c. 72. sec. 7.

[g] Abbott, part III. ch. x. 356.

finders or salvors, *(h)* but the practice has been long disused, and the reward become discretionary. *(i)*

In fixing the rate of salvage the court of Admiralty usually has regard not only to the labour and peril incurred by the salvors, but also to the promptitude and alacrity manifested by them, and to the value of the ship and cargo saved, as well as the degree of danger, from which they were rescued. But it will not suffer a claim of salvage to be ingrafted on the local ignorance of foreigners, who cannot be expected to be well acquainted with our coast, *(k)* although a recompence must be made for the service actually rendered to them. Neither is a passenger entitled to make any claim for the ordinary assistance he may be enabled to afford to the vessel in distress; it being the duty, as well as the interest, of all persons on board of every description, to contribute their aid on such an occasion. *(l)*

But in the case of a ship bound to the West Indies, which struck upon the shoals off Chichester, in a gale of wind, and in that situation was deserted by the master, who took part of the crew with him. The plaintiff who had commanded vessels in the same trade, and was then on board as a passenger, took the command (as the jury found, by the desire

[*h*] Case of the *Aquila*, 1 Rob. A. R. 37.

[*i*] *Wellwood's Sea Laws*, tit. 24.

[*k*] *The Willam Beckford Muffhead*, at the Delegates, 24 Nov. 1801. MS. 3 Rob. A. R. 355. S. C.

[*l*] *Vrow Margaretha, Jacobs*, 4 Rob. A. R. 103.

of the passengers and with the consent of the mate and the remainder of the crew) and carried the ship back in safety to Ramsgate Harbour. The jury accordingly gave 400*l.* by their verdict to the plaintiff, and on an application to the court of C. P. to set aside the verdict, the court considered the plaintiff to be entitled to a compensation in the nature of salvage, under the particular circumstances of this case, he having done more than the duty of a passenger required of him, and having taken upon himself a responsibility at the desire of the mate and crew, &c. (*m*)

In the case of valuable property, and numerous proprietors and salvors, the jurisdiction and proceedings of the court of Admiralty are admirably adapted to the purposes of justice. But as the delay and expense necessarily incident to the proceedings of a high tribunal, sitting at a distance from the subject in contest, will often be injurious to the parties, the legislature has endeavoured to introduce a more expeditious and less expensive mode of adjustment. (*n*) For this purpose various provisions were made by several statutes, which declare and enact that *reasonable salvage only* (conformably to the laws of Oleron) (*o*) shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three justices of the peace.

[*m*] Newman v. Walters, tried at Guildhall Sittings, Dec. 1803.

[*z*] 12 Ann. st. 2. c. 18. made perpetual by 4 Geo. 1. c. 12. and 26 Geo. 2. c. 19. [*o*] Leg. Oleron, art. 4.

But where the commander of a stranded vessel, having by the recommendation of the pilot who came to his assistance, sent to the defendant on shore, (o) till then a stranger to him, to send all the help which was necessary, which he accordingly did; and under his direction (but also under the inspection of custom-house officers attending) the goods were brought on shore and housed under the joint locks of himself and the collector of the customs; and he paid all the salvors. It was held, that this constituted him the agent of the owners, and took the case out of the stat. 12 Ann. st. 2. c. 18. sec. 2. for regulating the quantum of salvage by the award of three justices of the peace, which statute only applies to cases where application is made by the owner, &c. to certain public officers named, and the salvage is made under their orders.

It is however generally understood; that these wholesome statutes have not taken away the jurisdiction or authority which previously belonged to any court of justice.

It is necessary to observe, that wearing apparel of the master and seamen is always excepted from the allowance of salvage. The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect

[o] Sir F. Baring and others, v. Day (in *Trover*) 8 East 57.

they are under-valued. If there be no policy, the real value must be proved by invoices, &c. (p)

Underwriters, by their policy, expressly undertake to bear all expenses of salvage. (q) It is therefore not necessary to state them in a declaration as a special breach of the policy. But if the insurer pay the insured such expenses, and from particular circumstances the loss be replaced by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss. (r)

Where the salvage is high, and the other expenses are great, and the object of the voyage is defeated, the insured is allowed to *abandon* to the insurer, and call upon him to contribute for a total loss, which brings us to the subject of,

ABANDONMENT.—Before a person can demand from the underwriter a recompence for a total loss, he must *abandon* to him whatever claims he may have to the property insured; and when the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantage, resulting from that situation, in case the ship or property, &c. is not totally lost, or is afterwards restored by recapture, &c. (s)

[p] Park 140. Lex. Merc. [q] Hardw. 304. See ante I. 4.

[r] 1 Ves. 98. [s] Randall v. Cockran, 1 Ves. 98.

Abandonment is as ancient as the contract of insurance itself; the time within which it must be made, was not however fixed in England till lately. It is now held, that as soon as the insured receives accounts of such a loss as entitles him to abandon, he must, in the first instance, make his election whether he will abandon or not; and if he abandons, he must give the underwriters notice in a reasonable time, otherwise he waives the right to abandon,^(t) and can never after recover for a total loss. But if the insured, hearing that the ship is disabled, and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured.^(u)

When an abandonment is made it must be total and not partial. And though the insured may in all cases choose not to abandon, yet he cannot at his pleasure abandon, and thereby turn a partial into a total loss; therefore some restrictions have been laid on the privilege of abandoning for fear of letting in frauds.^(x)

We have already seen (ante II. 1.) that the insured may abandon to the underwriter, and call upon him for a total loss, if the damages exceed half the value;

[t] *Mitchell v. Edie*, 1 Term Rep. 608.

[u] *Da Costa v. Newnham*, 2 T. R. 407.

[x] 2 Burr. 697.

if the voyage be absolutely lost, or not worth pursuing; if further expense be necessary, (y) and the insurer will not engage, at all events, to bear that expense, though it should exceed the value, or fail of success. But he cannot abandon unless at some period or other of the voyage there has been a total loss. (z) Also if neither the thing insured, nor the voyage be lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon. (b)

The case of *Goss v. Withers*, was the first in which the doctrine of abandonment was gone into at large, and the above principles fully settled; (c) which have ever since been strictly adhered to, and were particularly recognized in subsequent determinations, when it was solemnly determined that the right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon; in that case, therefore, where there was a capture and recapture, and it was stated, that at the time of the offer to abandon, the peril was over, as the ship was safe in port, and had suffered no damage, (d) the court held, that the insured had no right to abandon.

[y] *Manning v. Newnham*, Tr. 22 Geo. 3.

[z] *Cazalet and others, v. St. Barbe*, 1 Term Rep. 187.

[b] 2 Burr. 1211. 3 Atk 195. *Goss and another v. Withers*, 2 Burr. 683.

[c] *Milles v. Fletcher*, Doug. 219. *Hamilton v. Mendes*, 2 Burr. 1198. and 1 Black. 296.

[d] *Hamilton v. Mendes*, 2 Burr. 1198 : 1 Black. 276 ; Park c. 9.

No capture by the enemy can be so total a loss, as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be entitled,^(e) before condemnation or after, to restitution upon stated salvage. This chance does not suspend the demand for a total loss upon the insurer; but justice is done by putting him in the place of the insured, in case of a recapture. In questions upon policies, the nature of the contract as an indemnity, and nothing else, is always liberally considered. There might be circumstances under which a capture would be but a small temporary hindrance to the voyage, perhaps none at all; as if a ship were taken, and in a day or two retaken, or escaped entire, and pursued her voyage, under which circumstances it would only be deemed an average loss. But a change of property is immaterial between the insurer and insured, because by the marine law of England there is no change of property in case of capture,^(f) as by the above-mentioned act of parliament, the *jus postliminii* continues for ever.^(g)

Upon a hostile embargo in a foreign port, the owner who had separately insured *ship* and *freight* abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned her freight; held, that the as-

[e] 29 Geo. 2. c. 34. sec. 24.

[f] 29 Geo. 2. c. 4. sec. 24.

[g] See ante for definition.

sured could not recover as for a total loss of freight, the freight having been in fact earned ;(*h*) or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment.

A ship owner having first insured his ship with *A*, &c. and his freight with *B*, &c. for a certain voyage, (*i*) and having notice of an embargo laid on the ship in a foreign port, abandons the ship and freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss of both ; first undertaking by a memorandum on the "ship" policy, to assign to the underwriters thereon, his interest in the ship, and to account to them for it ; and afterwards undertaking, by a similar memorandum on the *freight* policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured ; held, that however the question of priority as to the title to the freight might have been as to the different sets of underwriters litigating, out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship ; yet that the

[*h*] *M'Carthy v. Abel*, 5 East 388.

[*i*] *Thompson v. Rowcroft*, 4 East 34.

assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking, to pay it over to the underwriters on freight; and that without deducting the expenses of provisions, wages &c. which were charges on the owner before the abandonment, and on the underwriters on the ship afterwards.

A vessel sailing with corn insured from Waterford to Liverpool, (k) by a policy with a memorandum to be free from all but general average, was stranded near Waterford on the 28th January, and the vessel continued at high tide under water for near a month, during which time from the 31st, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried; but no notice of abandonment was given to the underwriters in London till the 18th February; though there is a constant regular intercourse between Waterford and Liverpool wheresome of the assured lived; which notice was holden to be out of time. For whether or not upon such a policy where there was an opportunity of sending the corn saved to the place of its destination, within two months after the accident, in another vessel, the assured were entitled to abandon, as in case of a total loss; at all events they ought to have made their election within a *reasonable time* (on which it seems

[k] Anderson v. The Royal Exchange Assurance Company, 7 East 33.

that the judge ought to instruct a jury under the circumstances of the case) and they cannot take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon when they find that they cannot turn it to their advantage.

While a ship was forcibly detained in a foreign port, (1) the owner abandoned first the *ship*, and then the *freight*, to the different sets of underwriters thereon, who paid as for a *total* loss; after which the ship was liberated, re-shipped her cargo, which had been taken out, and returned home, *earning freight*, which was received by the assured. *Quere*, Whether the assured, after the abandonment of the *ship* (which was a *seeking* not a *chartered* ship, on which a distinction may arise) could abandon the *freight* to another set of underwriters; but assuming that he might, the ship and freight are *salvage* to the different underwriters, after deducting the following expenses, which must be apportioned between them according to their several interests: 1. The expenses of the ship and crew in the foreign port, including port charges (besides the expense of shipping the cargo, which exclusively belongs to the underwriters on *freight*.) 2. Insurance thereon. 3. Wages and provisions of the crew from their libera-

[1] *Sharp v. Gladstone*, 7 East 24.

tion in the foreign port till their discharge here.

4. Wages (provisions were supplied by the foreign government) to the crew during their detention. But the assured was not entitled to deduct out of the freight received payable to the underwriter on freight :

1. Charges paid at the port of discharge on ship and cargo. 2. Insurance on ship. 3. Diminution in value of ship and tackle by wear and tear of the voyage home.

III. 1. OF FRAUD. ILLEGALITY, OR IRREGULARITY; WHICH EITHER VITIATE THE POLICY, OR PREVENT A RECOVERY THOUGH A LOSS HAPPEN.

1. *Of Direct Fraud in policies.*

POLICIES are annulled by the least shadow of *fraud*; or undue concealment of facts; both parties are therefore equally bound to disclose circumstances within their knowledge, since no contract can be good, unless it be equal; that is, neither side must have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person insured, and therefore it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete; accordingly the learned judges of our courts of law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith, (a) and the strictest

[a] Grot de jure belli, lib. 2. c. 12. sec. 23. Puffendorff de jure, nat. 1. 5, c. 9. sec. 8. Bynkershoek quest. jur. p. 4. l. 4. c. 26. Ord. de Lew. 14. sec. 38.

integrity, have constantly held, that it is vacated and annulled by any the least shadow of fraud or undue concealment; and therefore, if the insurer, at the time he underwrites, (b) can be proved to have known that the ship was safe arrived, the contract will be equally void, as if the insured had concealed from him any accident which had befallen the ship.

Cases of fraud upon this subject are liable to a three-fold division: 1st, The *allegatio falsi*; 2d, The *suppressio veri*; 3d, *Misrepresentation*. The latter is made a separate head; as though, if wilful, it is a direct fraud, (c) yet if it happen by mistake if in a material point, it will equally vitiate the policy.

As to the first point, several cases have determined that the policy shall be void, where goods, &c. are insured as the property of an ally, or as neutral property, when in fact they are the goods of an enemy; (d) and such false assertions in a policy will vitiate the contract though the loss happen in a mode not affected by that falsity.

The second species of fraud, concealment of circumstances, vitiates all contracts of insurance. The facts upon which the risk is to be computed, lie,

[b] Park c. 10. 2 Comm. 460. 1 Black. Rep. 594. 3 Burr. 1909.

[c] Park c. 10. Dougl. 247, 260.

[d] Park c. 10. Skinn. 327. 3 Burr, 1419. 1 Black. Rep. 427.

for the most part, within the knowledge of the insured only. The underwriter relies upon him for all necessary information, and must trust to him that he will conceal nothing, so as to make him form a wrong estimate ; on this ground, where one having an account that a ship described like his,^(e) was taken, insured his own ship, without giving any notice to the insurers of what he had heard, the policy was decreed in equity to be delivered up. But there are many matters as to which the insured may be innocently silent : 1st. as to what the insurer knows, however he came by that knowledge. 2d. As to what he ought to know. 3d. As to what lessens the risk. And it may be here remarked, that an underwriter is bound to know political perils, as to the state of war or peace ; he also ought to be acquainted with the nature and danger of every voyage, which may be called natural perils ; if he insure a privateer, it is understood that he is not to be informed of its destination ; and as men reason differently, from different facts, he needs not be told another's conclusion from known facts. In short, the question, in cases of concealment,^(f) must always be, “ whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement or concealment ; fraudulent, if designed, “ or if not designed, varying *materially* the object “ of the policy, and changing the risk understood

[e] 2 P. Wms. 170. 1 Black. R. 463, 594. 2 Stra. 1183. Park c. 10.

[f] Carter v. Boehm, 3 Burr. 1905. 1 Black. Rep. 593.

“to be run.” The above rules, and the whole doctrine of concealment, were laid down in the case cited, which was an insurance by the Governor of *Fort Marlborough* in *Bencoolen*,(g) against the event of the fort being taken by any European power in the course of a year.(h) And the rules there advanced and illustrated, have been confirmed in subsequent cases.

A *Representation* is a state of the case, not forming a part of the written instrument or policy, as a warranty does. Therefore, if there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement, as in case of warranty. And if a representation be false in any *material* point, even through mistake, it will avoid the policy, because the underwriter has computed the risk upon circumstances which did not exist.(i) In the case of *Pawson v. Watson*, Lord Mansfield stated, that “there cannot be a clearer distinction than that which exists between a warranty, which makes part of the written policy, and a collateral representation, which if false in a point of materiality, makes the policy void; but if not material it can hardly ever be fraudulent.” And in *Macdowall v. Frazer*,(k) the same learned judge laid down, “that a representation must be fair and true. It

[g] *Carter v. Boehm*, ante p.

[h] *Planche and another v. Fletcher*, Dougl. 238, 251. *Mayne v. Walter*. B. R. East 22 G. 3.

[i] *Park* c. 10. Cowp. 785. [k] Dougl. 247.

“ should be true as to all the insured knows ; and if
 “ he represent facts to the underwriter, without know-
 “ ing the truth, he takes the risk upon himself.”(l)
 But the difference between fact, as it turns out,
 and as represented, must be material.

The policy is void if the broker conceal any *mate-
 rial* circumstances, though the only ground for not
 mentioning them, should be that the facts concealed
 appeared immaterial to him.(m) But the thing
 concealed must be some *fact*, not a *mere speculation*
 or *expectation* of the insured.(n)

In all these cases of fraud, wherever there has
 been an allegation of falsehood, a concealment of
 circumstances, or a misrepresentation, it is imma-
 terial whether it be the act of the person himself who
 is interested, or of his agent ; for in either case the
 contract is founded in deception, and the policy is
 consequently void. And this rule prevails, even
 though the act cannot be at all traced to the owner
 of the property insured.(p)

A policy will not, however, be set aside on the
 ground of fraud, unless it be *fully* and *satisfactorily*

[l] Dougl. 260. Bize v. Fletcher, Dougl. 271. ; or Lavaber v.
 Wilson, 271, 284. See ante. I. 3.

[m] Shirley v. Wilkinson, Dougl. (293) 306. n.

[n] Barber v. Fletcher, Dougl. (292) 305.

[p] Stewart v. Dunlop in Dom. Proc. 1785. Fitzherbert v.
 Mather, 1 Term Rep. 12 Park c. 10.

proved ; and the burthen of proof lies on the persons wishing to take advantage of the fraud. Thus, if the insured is supposed to be guilty of fraud, the proof of it falls upon the underwriter ; because he is the person who is to derive a benefit from substantiating the charge.(q) This is not only the law of England, but the law of common sense, founded on principles of equity and justice. Although it has been said that fraud will not be presumed, unless it be fully and satisfactorily proved.(r)

But although it has been said, that fraud will not be presumed, unless it be *fully and satisfactorily proved*, it is not intended to convey an idea, that there must be a *positive* and *direct* proof of fraud, in order to annul the contract. The nature of the thing itself, which is generally carried on in a secret and clandestine manner, does not admit of such evidence ; and therefore, if no proof but that of actual fraud were allowed in such cases, much mischief and villainy would ensue, and pass with impunity. Circumstantial evidence is all that can be expected ; and indeed all that is necessary to substantiate such a charge.

Upon this principle it has been held, that the assured cannot recover on a policy of insurance, unless

[q] Park 214.

[r] Roccus Not. 51, 78. *Middlewood v. Blakes*, 7 Term Rep. 162.

he makes a full disclosure of all the circumstances of the intended voyage, even with respect to the tract the ship intends to take.

After an insurance on a ship on a trading voyage, the assured applied to the underwriters for leave to take in guns and a letter of marque, the latter of which was positively refused, notwithstanding which the ship sailed with a general letter of marque; this vacated the policy, though the assured did not in fact make use of the letter of marque for the purpose of cruising, or intended so to do, but merely took it on board for the purpose of cruising on the voyage home.(t)

But in effecting a policy on the 8th *January* at *Whitchaven*, on a ship, "at and from *Barbadoes* to "*Liverpool*," a broker's letter was produced, stating that the ship insured was not coppered, but a slow sailer;(u) and was expected to have sailed on the 28th *November*, and that the *Barton*, a coppered vessel, and very fleet, which had sailed the 24th from *Barbadoes*, had arrived on the 5th *January*; but no notice was taken of the *Agreeable*, another coppered and fleet vessel, which sailed the 29th *November*, having also arrived on the same day as the *Barton*. After verdict for the plaintiff the Court of Common Pleas

[t] *Denison v. Modigliani*, 5 T. R. 580.

[u] *Littledale and others, assignees of Kenyon a bankrupt v. Dixon*, 1 Bos. and Pull. New Reports, p. 151.

refused to grant a new trial on the ground of concealment.

Yet in an action on a policy on goods from *Berderygge* to *London*, effected by the consignees on the 13th *December*,^(x) without communicating a letter received by them the day before, but dated the 30th *November*, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the assurance as low as possible; held a material concealment, though the ship did not in fact sail until the 24th *December*.

If a ship be insured "at and from *A* to *B*,"^(y) and there be any illegality in the transaction during her stay at *A*, the assured cannot recover on the policy for a loss happening between *A* and *B*.

Frauds in contracts of insurance have not as yet had any punishment affixed to them by the laws of England; but there are one or two cases which have been declared to be felonies by positive statutes, where the act committed has been to the prejudice of the underwriters.

By a statute in the reign of Queen Anne,^(z) it was enacted, that if any captain, master, mariner, or

[x] *Willes and others v. Glover*, 1 Bos. & Pull. New Rep. E. 44. G. 3. p. 14. [y] *Bird v. Appleton*, 8 Term Rep. 562.

[z] 1 Ann. st. 2. c. 9. sec. 4.

other officer, belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owners thereof, or of any merchant or merchants that shall load goods thereon, (or by a subsequent statute, *(a)* to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon) shall suffer death as a felon; and the benefit of clergy is taken away from this offence, by 11 Geo. I. c. 29.

But in consequence of a recent case, it was determined by all the judges of England, *(b)* that the Admiralty have no jurisdiction to try offenders on the 11 Geo. I. c. 29. for procuring the destruction of a ship of which they were owners, "there being
"no evidence of any fact of procurement done upon
"the high seas, within the Admiralty jurisdiction,
"but only on shore within the body of a county." Wherefore the provisions of the 4 Geo. I. c. 12. s. 8. (amending 12 Ann. st. 2. c. 18.) and the 11 Geo. I. c. 29. sec. 5, 6, 7. respecting the casting away or destroying ships, or *procuring* the same to be cast away or destroyed, are now made felony without benefit of clergy; *(c)* and offences, if committed within the body of a county, shall be tried as other

[a] 4 Geo. 1. c. 12. sec. 3.

[b] *Rex v. Easterby and Macfarlane*, at the Admiralty Sessions, Oct. 1802. See Addenda to East's Pl. of the Crown xxvi.

[c] 43 Geo. 3. c. 113. sec. 1 and 2.

felonies(*d*) and if on the high seas as under 28 Hen. 8. c. 15.

It is established by the law of every mercantile state, and the uniform determination of the courts of *Westminster Hall*,(*e*) that the suppression or concealment of *material* intelligence, respecting a matter of insurance, whether fraudulent or not, vitiates the policy.

The above case, however, does not appear to have been a case of fraud or concealment,(*z*) though that was *alleged* by the underwriters in their defence, on which the ultimate decision was against them.

A ship on an *African* voyage,(*a*) the common duration of which is several months, and sometimes extends to a twelvemonth, or more, arrived on the coast in *August* 1799; and in *February* 1800 her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew and wounded others; by means of which, and of a fever, the crew were reduced to five, and all those sickly, and not a man to be procured at hand: that they had been plundered of their clothes,

[*d*] Sec. 3.

[*e*] *Thompson v. Buchanan and another*, 4 Bro. Parl. Cases, 482.

[*z*] *Thompson v. Buchanan and another*, 4 Pro. Parl. Cases, 482.

[*a*] *Freeland and another, assignees of Tipping a bankrupt, v. Glover*, 7 East. 457.

&c. and their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st *April* 1800, from *Gaboon river*, mentioned their arrival there on the 24th *March*: *that the natives finding them weakly handed, and their goods taken from them, did as they pleased*: that they had then nine men on board; *but* their provisions run very low; that he had mentioned certain parts of the cargo in his last letter, and expected to get off the rest, and to sail at the end of the next month. An insurance was effected in *September* 1800, on the production of the last letter only, "at and from the ship's arrival at her first place of trade on the coast of Africa," &c. Held sufficient that the last letter fully stated the then condition and circumstances of the ship, which, though better than when the first letter was written, was yet *no fraudulent concealment of the former circumstances*; the second letter both in its terms and contents referring to a former letter; which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties, in part subdued, and to the extent truly stated in the second letter, would have varied the risk: and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter, that the first arrival of the ship on the coast was only on the 24th of March, when she was stated to have arrived in *Gaboon river*, and to have had much of her homeward-

bound cargo on board on 21st *April*, and was expected to sail with the remainder by the end of *May*.

III. 2. *Of changing the Ship.*

Of those causes which will operate as a bar to the insured's recovering upon a policy of insurance, against the underwriter, the first to be mentioned is that of changing the ship; or, as it has commonly been called, changing the bottom. This will require but very little discussion. It has already been observed, that, except in some special cases of insurance upon *ship or ships*, it was essentially requisite to render a policy of insurance effectual, that the name of the ship, on which a risk was to be run, should be inserted. That being done, it follows as an implied condition that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences, in which case there would be no contract at all; nor during the course of the voyage remove the property insured to another ship, without the consent of the underwriters, or without being compelled by a case of unavoidable necessity. If he do, the implied condition is broken, and he cannot recover a satisfaction, in case of a loss, from the insurer; because the policy was upon goods, on board a particular ship, or upon the ship itself; and it becomes a material consideration in a contract of insurance, upon what vessel the risk is to be run; since the one may be much stronger,

and more able to resist the perils of the sea ; or by its swift sailing, much better able to escape from the pursuit of an enemy, than the other.

There is only one case to be met with in print upon the subject ; and that is not expressly in point to the present inquiry, although it seems to decide it.(b)

The general doctrine relative to changing the bottom of the ship was alluded to by Lord Mansfield, when delivering the opinion of the court in the case of *Pelly v. the Royal Assurance Company*.(c) “ One objection,” said his Lordship, “ was formed by comparing this case to that of changing the ship or bottom, on board of which goods are insured, *which the insured have no right to do*.(d) For there the identical ship is essential ; *that is the thing insured*. But the case is not like the present.”

From this passage it is evident, that Lord Mansfield intended to confirm the principle advanced above, namely, that when an insurance is made on a

[b] *Dick v. Barrell*, 2 Stra. 1248.

[c] 1 Burr. 351.

[d] This is to be taken as a rule, subject to the exception of inevitable or urgent necessity : for it has been held, that the owners of goods insured, by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they act from necessity, and for the benefit of all concerned. See *Plantamour v. Staples*, 1 Term. Rep. 611. note.

specific ship, and the insured not being impelled by any necessity, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract, and cannot recover against the underwriter.

But if necessity require it, the ship may be changed in the course of the voyage, and the insurer *on the cargo* continues liable.(e)

III. 3. *Of Deviation of the Voyage.*

Deviation, in marine insurances, is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined, and the underwriters are discharged from any responsibility. It is necessary, as we have seen, to insert in every policy of insurance, the place of the ship's departure, and also of her destination. Hence it is an implied condition to be performed on the part of the insured, that the ship shall pursue the most direct course, of which the nature of things will admit, to arrive at the destined port. If this be not done; if there be no special agreement to allow the ship to go to certain places out of the usual track; or if there be no just cause assigned for such deviation, it is but just and reasonable,(f) that the under-

[e] Park 19. a. 290.

[f] Roccus Not. 52.

writer should no longer be bound by his contract, the insurer having failed to comply with the terms, on which the policy was made. For if the voyage be changed after the departure of the ship, it becomes a different voyage, and not that against which the insurer has undertaken to indemnify ;(*g*) (which is the true objection to a deviation) the risk may be tentimes greater, which probably the insurer would not have run at all, or at least would not, without a larger premium. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation ; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was, or was not, consenting to the deviation.

These principles have been established by many decisions in the various courts of *Westminster Hall*, and also by a solemn determination in the house of Lords.(*h*)

Whenever the deviation is occasioned by absolute necessity : as where the crew force the captain to deviate, the underwriters continue liable.(*i*) And the general justifications for a deviation seem to be

[*g*] Dougl. Rep. 288.

[*h*] Fox v. Black. Townson v. Guyon, Park 295. Elliot and others v. Wilson's Crs. 4 Bro. Parl. Cases, 2d Edit. 470.

[*i*] Elton v. Brogden, 2 Stra. 1264.

these : to repair the vessel, to avoid an impending storm, to escape from an enemy, or to seek convoy.(k)

If therefore a ship is decayed, or hurt by a storm, and goes to the nearest port to refit, it is no deviation, because it is for the general interest of all concerned.(l) So whenever a ship, in order to escape a storm, goes out of the direct course, or, when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation. And if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven.(m)

A deviation may be justified, if done to avoid an enemy, or seek the convoy ; because it is in truth no deviation to go out of the course of a voyage, in order to avoid a danger, or to obtain a protection against it : if in all cases the master of a ship act fairly and *bona fide* according to the best of his judgment.(n)

In all cases of deviation, it may be laid down as a general rule, that wherever a ship does that which

[k] 1 Term. R. 22. 2 Salk. 445. 2 Stra. 1265.

[l] Motteux and others v. the Lon. Ass. Comp. 1 Atk. 545. Park c. 17.

[m] Delany v. Stoddart, 1 T. R. 22. Park c. 17.

[n] Bond v. Gonsales, 2 Salk. 445. Gordon v. Morley. Campbell v. Bordieu, 2 Stra. 1265. Park c. 17.

is for the general benefit of the parties concerned, the act is as much within the spirit of the policy as if it had been expressed: and in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequence, of the act, as the true ground of judgment.(o) But to avoid as much as possible any additional risk, in case of a deviation from necessity, the ship must pursue such *voyage of necessity*, in the direct course, and in the shortest time possible, as nothing more must be done than the necessity requires, otherwise the underwriters will be discharged.(p)

A deviation *merely intended*, but never carried into effect, does not discharge the insurers, and whatever loss happens before actual deviation or the dividing point of the voyage, falls upon the underwriters.(q) But if it can be shewn that the parties never intended to sail upon the voyage insured, if all the ship's papers be made out from a different place, the insurer is discharged, though the loss should happen before the dividing point of the two voyages.(r) And in all cases, deviation or not is a question of fact, to be decided subject to the above rules, according to the circumstances of the case.(s)

[o] Cowp. 601.

[h] Lavabre v. Walter, Dougl. (271) 284.

[q] Foster v. Wilmer, 2 Stra. 1249. Thellusson v. Ferguson, Dougl. 346, 361. Green v. Young, 2d Ld Raym. 840. 2 Salk. 444. S. C.

[r] Wooldridge v. Boydell, Dougl. 16

[s] See also Way v. Modigliani, 2 Term Rep. 30. And Middlewood v. Blakes, 7 T. R. 162. Dougl. 787.

A ship was insured for a voyage from *Virginia* to *Rotterdam*, with leave to call at a port in *England*; (t) and after the underwriters had signed the policy, the destination of the voyage was altered to the port of *Hull*, there to discharge, instead of *Rotterdam*, and a memorandum of this alteration was indorsed on the policy. *Hull* is not a port in the course between *Virginia* and *Rotterdam*, but two degrees north of that course. The ship was afterwards lost. Held, that the alteration of the voyage vacated the policy as to all the underwriters except those who signed the indorsement.

A wilful deviation from the due course of an insured voyage, is in all cases a determination of the policy; (u) from that moment the contract between the insurers and insured is at an end; and it is totally immaterial from what cause, or at what place the subsequent loss arises, the insurers being in no case answerable for it.

If the voyage described in the policy be from *A* to *B* and *C*, and the ship go to *C* before *B* (though *C* be nearer to *A* than *B*) it is a deviation if it be not the regular settled course of the voyage to go to *C* first. (x)

[t] *Laird v. Robertson and others*, 4 Bro. Parl. Cases, 2d ed. 488.

[u] *Elliot and others v. Wilson & Co.* Bro. Parl. Cases, 2d edit. 470.

[x] *Beatson v. Haworth*, 6 T. Rep. 531.

Whether such a regular and settled voyage(y) will controul such a policy? Quer.

A deviation of a vessel from the voyage insured, through the ignorance of the captain,(z) or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry.

Policy on goods on board a particular ship from *A* to *B*,(a) “against sea risk and fire only;” in the course of the voyage from *A* to *B*, the ship was carried out of the course of the voyage by a king’s ship, but being afterwards released she proceeded on the voyage insured, and while so proceeding the goods insured sustained *sea damage*: held, the underwriters were liable for this loss.

A policy of insurance on a ship on a certain commercial voyage, *with or without letters of marque*,(b) giving leave to the assured to *chase, capture, and man prizes*, however it may warrant him in weighing anchor, while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing an enemy who had before anchored at the same place, in sight of him; and was then endeavouring

[y] Ibid.

[z] *Phyn v. the Royal Exch. Assurance Comp.* 7 Term Rep. 505.

[a] *Scott and another v. Thompson*, 1 Bos. and Pul. New Rep. 181.

[b] *Lawrence and others v. Sydebotham*, 6 East 45.

to escape, will not warrant him after the capture, and in the course of the further prosecution of the voyage in *shortening sail and laying to* in order to let the prize keep up with him, for the purpose of protecting her as a *convoy*. into port, in order to have her condemned; though such port were within the voyage insured.

The words in a policy of insurance “*with or without letters of marque*,”(c) do not appear to authorise direct *cruising* out of the course of the voyage insured in search of prize.

III. 4. *Of Sea-worthiness.*

Upon this point it has been determined, that every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect, wholly unknown to the parties, that will vacate the contract; and the insurers are discharged. This doctrine is founded upon that general principal of insurance law, that the insurers shall not be responsible for any loss arising from the insufficient or defective quality or condition of the thing insured.(d)

There is in the contract of insurance, a tacit and implied agreement that every thing shall be in that state and condition in which it ought to be: and

[c] *Parr v. Anderson*, 6 East 202.

[d] *Park* c. 11.

therefore it is not sufficient for the insured to say, that he did not know that the ship was not sea-worthy ; for he *ought* to know that she was so, at the time he made the insurance. The ship is the *substratum* of the contract between the parties. A ship not capable of performing the voyage is the same as if it were no ship at all ; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter ; because such defect is not the consequence of any external misfortune, or any unavoidable accident, arising from the perils of the sea, or any other risk, against which the underwriter engages to indemnify the person insured.(e)

The ground of decision in this case is perfectly distinct from any principle of fraud ; and depends merely upon this, that the insured is presumed to be better acquainted with the state and condition of his ship than any other man ; and that he has tacitly undertaken, that she is in a condition to perform the destined voyage. But although the insured ought to know whether his ship was sea-worthy or not at the time she set out upon her voyage ; yet he may not be able to know the condition she may be in after she is out a twelvemonth :(f) and therefore, whenever it can be made appear, that the decay, to which the loss is attributable, did not commence till a period subsequent to the insurance, as she was

[e] Ibid.

[f] 5 Burr. 2804.

sea-worthy at the time, the underwriter, it is presumed, would be liable. And so it was held by Lord Mansfield(*g*) that “by an implied warranty every ship insured must be tight, staunch, and strong; but it is sufficient if she be so, at the time of her sailing. She may cease to be so in twenty-four hours after departure, and yet the underwriter will continue liable.” Every case, however, must depend upon its own circumstances, but when they are once ascertained, the rule of law is clear and decisive.

The whole doctrine of *sea-worthiness* was settled in the case of the *Mills* frigate, (*h*) where the insurance was upon a ship which had a latent defect totally unknown to the parties: and it was held, that the insurers were not liable, because the ship was not sea-worthy; and that however innocent or unfortunate the insured might be, yet if the ship be not sea-worthy at the time of insuring, there is no *contract at all* between the parties; because the very foundation of the contract, the *ship*, was in the same condition as if it did not exist; and the doctrine is the same in insurance upon goods, as when it is upon the ship itself. (*i*)

As an assured impliedly warrants the ship insured to be sea-worthy, (*k*) whatever forms an ingredient.

[*g*] *Eden v. Parkinson*, Doug. 708.

[*h*] *Mills and another v. Roebuck* in the Exchequer.

[*i*] See Park c. 11.

[*k*] *Hayward and another v. Rodgers*, 4 East 590.

in sea-worthiness, is not necessary to be disclosed by the assured to the underwriter in the first instance, unless information upon the subject be particularly called for, and then the assured must disclose truly what he knows in the respect required : therefore where the assured of a ship had received a letter from the captain, informing him that he had been obliged to have a survey on the ship *at Trinidad, on account of her bad character*; but the survey which accompanied the letter gave the ship a good character : held that the non-disclosure of such letter and survey to the underwriters did not vacate the policy ; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of insurance.

The assured cannot recover upon a policy of insurance, unless he equips the ship with every thing necessary in her navigation during the voyage ; and therefore he cannot recover if there be no pilot on board.(1)

Whether it be necessary, to the right of the assured, to recover that, in navigating up the *Thames*, there should be a pilot on board(m) qualified according to the directions of the stat. 5 G. 2. c. 20. Quer.

[1] *Law v. Hollingworth*, 7 T. Rep. 160.

[m] *Ibid.*

III. 5. *Of Wager Policies.*

Wager Policies, upon *interest or no interest*, the performance of the voyage in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of insurance. But such policies being contradictory to the real nature of an insurance, which is a contract of indemnity, seem to have been originally bad ;(*n*) because insurances were invented for the benefit of trade, and not that persons unconcerned or uninterested should profit by them. Indeed these wager policies(*o*) were not introduced into *England* till after the revolution, and the courts of law looked upon them with a jealous eye ; while the courts of equity considered them as absolutely void.

The great distinction between *interest* and *wager policies* was that in the former the insured recovered for the loss actually sustained, whether it was a total or partial loss ;(*p*) in the latter he never could recover but for a total loss. At length it was found, that the indulgence given to these fictitious or to speak more plainly, gambling policies, had increased to such an alarming degree, as to threaten the very annihilation of that security which it was the original intent of insurances to introduce.

[*n*] Park c. 14. *Assevedo v. Cambridge*, 10. Mod. 77. *Depaiba v. Ludlow*, Com. Rep. 360.

[*o*] *Goddart v. Garret*, 2 Vern. 269. *Le Pyre v. Farr*, *ibid.* 716.

[*p*] *Goss and another v. Withers*, 2 Burr. 683.

Accordingly an act of parliament passed in the nineteenth year of King George the Second, entitled, "An act to regulate insurance on ships belonging to the subjects of *Great Britain*, and on merchandizes or effects thereon." As this act is the most important and most extensive in the whole code of statute law, with regard to insurances, I shall cite as much of it at length, as relates to the present head, and the other clauses of it under those heads to which they more immediately apply.

The causes, which co-operated to induce the legislative body to pass such an act, (q) are fully stated in the preamble: "Whereas it hath been found by experience, that the making assurances, interest or no interest, or without farther proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the public revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on

[q] 19 Geo. 2. c. 37.

“ shipping, and fair trade, the institution and laudable design of making assurances hath been perverted ; and that which was intended for the encouragement of trade and navigation, has, in many instances, become hurtful of, and destructive to the same :”

“ For remedy whereof be it enacted,(r) That no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty, or any of his subjects, or on any goods, merchandizes or effects, laden or to be laden on board of any such ship or ships *interest or no interest*, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer ; and that every such insurance shall be null and void to all intents and purposes.”

“ Provided always,(s) That assurance on private ships of war, fitted out by any of his majesty’s subjects solely to cruise against his Majesty’s enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer ; any thing herein contained to the contrary thereof in anywise notwithstanding.”

“ Provided also,(t) That any merchandizes or effects from any ports or places in *Europe* or

“ *America*, in the possession of the crowns of *Spain*
“ or *Portugal*, may be assured in such way and man-
“ ner as if this act had not been made.”

By the fourth section it is enacted,(u) “ That it
“ should not be lawful to make re-assurance, unless
“ the assurer should be insolvent, become bank-
“ rupt, or die ;(x) in either of which cases, such
“ assurer, his executors, administrators, or assigns,
“ might make re-assurance to the amount by him
“ before assured, provided it should be expressed in
“ the policy to be a re-assurance.”

“ And be it enacted,(y) That all and every sum
“ and sums of money to be lent on bottomry, or at
“ *respondentia*, upon any ship or ships belonging to
“ any of his Majesty’s subjects bound to or from
“ the *East Indies*, shall be lent only on the ship, or
“ on the merchandise, or effects, laden or to be laden,
“ on board of such ship, and shall be so expressed
“ in the condition of the said bond : and the benefit
“ of salvage shall be allowed to the lender, his agents
“ or assigns, *who alone shall have a right to make*
“ *assurance on the money so lent* ; and no borrower
“ of money on bottomry or *respondentia*, as aforesaid
“ shall recover more on any assurance than the
“ value of his interest in the ship, or in the mer-
“ chandizes or effects, laden on board such ship,
“ exclusive of the money so borrowed ; and in case

[u] Sect. 4. [x] Sec. 19 Geo. 2. c. 32. sect. 2. [y] Sect. 5.

“ it shall appear, that the value of his share in the
“ ship, or in the merchandises or effects laden on
“ board, doth not amount to the full sum or sums
“ he hath borrowed as aforesaid, such borrower shall
“ be responsible to the lender for so much of the
“ money borrowed as he hath not laid out on the
“ ship or merchandise laden thereon, with the lawful
“ interest for the same, together with the assurance
“ and all other charges thereon, in the proportion
“ the money not laid out shall bear to the whole
“ money lent, notwithstanding the ship and merchan-
“ dises be totally lost.”

Upon this last section it may be sufficient in this place to observe, that none but the lender shall have a right to make insurance on the money lent. This regulation of insurance on bottomry or *respondentia* interest, extends only to *East India* ships : and therefore, an insurance on a *respondentia* interest upon any other ships may be made in the same manner as they used to be before this act. It has also been decided upon this clause of the act, that it never meant or intended to make any alteration in the manner of insurances : and it was declared by the whole Court, (z) in *Glover v. Black*, to be the established law and usage of merchants, that *respondentia* and bottomry must be mentioned and specified in the policy of insurance.

[z] *Glover v. Black*, 3 Burr. 1394.

By the first section of the act it is clear that at this day all insurances made contrary to it are absolutely void and of no effect ; which, as has already been shewn, was also the case by the ancient law of this country. It may be now material to consider, first what cases have, by the construction put by the learned judges upon this statute, been held not to fall within its description ; and secondly, those which do, and in which consequently the policies have been holden to be void.

It was formerly doubted whether the act extended to insurances of foreign ships and property, and the better opinion was that it did not ; for it was clear, that such insurances did not fall within the words of the statute : But these doubts are entirely at an end by several decisions of the court,(a) (and the reason for it stated) that the act was not designed to extend to foreign ships.

It was formerly thought, that a *valued* policy was a wager policy, like interest or no interest. But this idea is now exploded, as we shall presently shew by a solemn decision of the Court of King's Bench. Of the difference between open and valued policies much has been already said ; and the origin of the latter was derived from this source, it being sometimes troublesome to the trader to prove the value of his inter-

[a] *Thellusson v. Fletcher*, Doug. 301.

est, or to ascertain the quantity of his loss, he gave in consequence the insurer a higher premium to agree to estimate his interest at a precise sum. To recover upon this kind of policy, the insured need only prove that he had an interest, without shewing the value. If indeed it appeared, or could be made to appear, that the interest proved was merely a cover to a wager, in order to evade the statute, there is no doubt such a policy would be void.

In *Lewis v. Rucker*, this doctrine was fully stated and commented upon by Lord Mansfield, (b) when his Lordship and the Court of King's Bench held that, "a valued policy is not to be considered as a
 "wager-policy; or like *interest or no interest*. If it
 "were, it would be void, by the act of the 19 Geo.
 "2. c. 37. The only effect of the valuation (said his
 "Lordship) is fixing the amount of the prime cost;
 "just as if the parties had admitted it at the trial:
 "but in every argument, and for every other purpose,
 "it must be taken that the value was fixed *in such a*
 "*manner*, as that the insured meant only to have
 "an indemnity. If it be undervalued the merchant
 "himself stands the insurer for the surplus. If it be
 "*much over-valued*, it must be done with a bad view;
 "either to gain, contrary to the 19th of the late King,
 "or with some view to a fraudulent loss: therefore
 "an insured never can be allowed to plead in a court
 "of justice, that he has greatly overvalued, or that

[b] *Lewis v. Rucker*, 2 Burr. 1167.

“ his interest was a trifle only. It is settled, that
“ upon valued policies, the merchant need only
“ prove some interest, to take it out of 19 Geo. 2.
“ because the adverse party has admitted the value :
“ and if more were required, the agreed violation
“ would signify nothing. But if it should come
“ out in proof that a man had insured 2,000*l*. and
“ had interest on board to the value of a cable only ;
“ there never has been, and I believe there never
“ will be a determination, that by such an evasion
“ the act of parliament may be defeated. There are
“ many conveniencies from allowing valued pol-
“ icies : but where they are used merely as a cover
“ to a wager, they would be considered as an eva-
“ sion. The effect of the valuation is only fixing
“ conclusively the prime cost. If it be an open
“ policy, the prime cost must be proved : in a
“ valued policy it is agreed.”

This doctrine was adopted and confirmed in a subsequent case(c) where “ it was agreed that
“ the profits of the cargo should be valued at 1,000*l*.
“ without any other voucher than the policy.” This
it was insisted, rendered the policy void. But the
Court held that “ the meaning of such a policy was
“ not to evade the act of parliament, but to avoid the
“ difficulty of going into an exact account of the
“ quantum,” adding “ there was no pretence for
“ saying it was a wagering policy.”

[c] *Grant v. Parkinson*, Mich. 22 Geo. 3. B. R.

And in a very modern case(*d*) it was held, that the profits of a cargo employed in trade on the coast of Africa are an insurable interest.

So an insurance on *imaginary profit* from Bourdeaux to Hamburg, (which was explained to mean the profit which a cargo of indigo belonging to the assured would produce on the sale thereof at Hamburg, if it arrived safe) was holden good.(*e*)

In a very late case, where the interest was declared by the policy to be "*on the commissions of the plaintiff, as consignee of the cargo valued at fifteen hundred pounds,*"(*f*) Lord Kenyon expressed a very strong opinion, that this was a good insurable interest; but the matter being compromised, it did not come to any decision.

The second section of the act in question, which allows of insurances being made on private ships of war, interest or no interest, seems sufficiently clear, and requires no explanation.

But an insurance was made upon a privateer for a cruize of four months,(*g*) the ship being valued at 1000*l.* *without further account*, and free from average. During the cruize the crew mutined, and carried the

[*d*] *Barclay v. Cousins*, 2 East 554. Tr. Term, 42 Geo. 3.

[*e*] *Henricksen v. Margetson*, B. R. Mich. 1776. cited *Ibid*.

[*f*] *Flint v. Le Mesurier*, Sitts. after Hil. Term, 1796.

[*g*] *Fitzgerald v. Pole*, 4 Bro. Parl. Cases, 2d edit. 439.

ship into port, whereby the benefit of the cruize was lost. But the ship, which was the thing insured, was in safety at the expiration of the four months, wherefore the underwriters were held not to be liable.

In the above case the judgment of the Exchequer chamber, reversing that of the Court of King's Bench, was affirmed by the House of Lords on a writ of error in parliament, where it was observed, that the insurer being, by the terms of the policy, *free from all average*, the plaintiff could not be entitled to recover but in case of a total loss; and the ship being found by the special verdict to be in good safety at her proper port, at and after the end of the four months for which the insurance was made, there could be no loss.

The third section of the above act, (*h*) by which insurances upon any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal*, may be effected in the manner practised before this act was passed, seems to be obscurely worded. This proviso is founded on the regulations of those states to prohibit illicit trade; the consequence of such prohibition is, that all the goods and merchandizes, which the subjects of this and other countries export from *Spain* and *Portugal*, must be in the names of *Spanish* subjects, so that it was necessary to make

this exception, otherwise all insurances upon that branch of trade must have been entirely void. The words, however, seem to allow a greater latitude than was meant by the legislature in making such a provision.

Upon this section of the act, it may be observed, that the equitable constructions of such contracts of insurance as are protected by it, seems to be, that they may be made without interest, notwithstanding the case of *Goddard v. Garret*, above cited : (i) since in such instances it is impossible for the person insured to bring proof of interest on board.

In a case (k) where *A* having insured 800*l.* upon his own ship, and being greatly indebted to *B* deposits several securities in his hands, and also makes an absolute assignment to him of the ship. The ship was afterwards lost. On an action brought against the underwriters to recover the insurance, they insisted that the policy was void for want of interest, under the statute (l) against wager-policies, *A* having sold the ship previous to the loss ; but it was held, that he had a sufficient interest in the ship at the time of the loss ; the real transaction being no more than a pledge or security for the debt due to *B*.

[i] V. ante p. 116.

[k] *Alston and others v. Campbell*, 4 Pro. Parl. Cases, 2d edit. 476. [l] 19 Geo. 2.c. 37.

III. 6. *Of Valued Policies.*

A *Valued Policy* is not a wager-policy : it originates from the circumstances of its being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss, he gave, in consequence, the insurer a higher premium, to agree to estimate his interest at a sum certain. In this case the plaintiff must prove some interest, although he need not prove the value of his interest.^(m) But if a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void.⁽ⁿ⁾

It has been settled,^(o) that, upon a joint capture by the army and navy, the officers and crews of the ships, before condemnation have an insurable interest, by virtue of the prize act, which usually passes at the commencement of a war.

All contracts of insurance, made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and as such void.^(p) And wherever the Court can see upon the face of the policy, that it is merely a contract of gaming, where indem-

[m] *Lewis v. Rucker*, 2 Burr. 1167.

[n] *Da Costa v. Firth*, 4 Burr. 1966.

[o] *Le Cras v. Hughes*, B.R. East 22 Geo. 3.

[p] *Kent v. Bird*, Cowp. 583.

nity is not the object in view, they are bound to declare such policy void.(q)

In the case of a valued policy, on both ship and cargo,(r) the assured must recover the whole sum underwritten, because he could not have any claim for a return of premium for short interest, if the ship had arrived safe.

On an assurance on a ship and goods,(s) valued at so much on a voyage to *Africa* and the *West Indies*, the assured is entitled to recover the whole sum on a total loss, which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered.

Upon an insurance on profits valued at 400%. where the plaintiff declared as for a *total loss* ;(t) and it appeared, that after a shipwreck by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, and were sold; and it did not appear what

[q] Lowry and another v. Bourdieu, Doug. 451.

[r] Macnair v. Coulter and others, 4 Bro. Parl. Cases, 2d. edit. 452.

[s] Shaw v. Felton, 2 East 109.

[t] Hodgson v. Glover, 6 East 316.

profit was made of them ; though it was found that the produce of those who were sold did not give a profit upon the whole adventure : held, that the plaintiff was not entitled to recover. Note—The whole adventure was a voyage from Liverpool to Africa, and from thence to the West Indies, but the profits were only insured from St. Vincents (after the ship's arrival there) to her last port of discharge in the West Indies.

III. 7. Of Illegal Voyages.

Whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of the country, the policy is void *ab initio*. The principle upon which such a regulation is founded, is not peculiar to this kind of contract ; for it is nothing more than that which destroys all contracts whatsoever, that men can never be presumed to make an agreement forbidden by the laws ;(t) and if they should attempt such a thing, it is invalid, and will not receive the assistance of a court of justice, as that which is unlawful and a public wrong, can never be the ground of an action. So also in case of a ship being engaged in an illegal traffic, the assured could not recover for a loss of the ship in the course of her voyage homeward.(u)

[t] *Johnston v. Sutton*. Doug. 241.

[u] *Camden v. Anderson*, 6 Term Rep. 723. 1 Bos. & Pull. Rep. 273. *Wilson v. Marryat*, 8 Term Rep. 31. 1 Bos. & Pull. 430. *Bird v. Appleton*, 8 T.R. 562.

If a ship, though neutral, be insured on a voyage prohibited by an embargo, laid on in time of war, by the prince of the country, in whose ports the ship happens to be, *(x)* such an insurance is void. This, however, depends upon the power of an embargo, the right of laying on which, in time of war, is undoubted; *(y)* although in time of peace, the power of the king in such a measure may be a different question. The right, however, being admitted, it follows of course; that any act done in contravention of a proclamation of this nature, is illegal and criminal; because it is equally binding as an act of parliament, and a contract founded on such illicit proceedings is consequently void. *(z)*

So the trading with an enemy, in time of actual war, even through the medium of neutral ships, is illegal; and that question is now for ever at rest in the law of England, *(a)* by the solemn decisions in several very recent and important cases; as is the insurance of enemy's property, although such insurance does not contravene any positive law known at this day in England. But whatever doubts might formerly obtain, either as to the legality or expediency of such insurances, *(b)* the question is now

[*x*] 1 Black. Com. 270. [*y*] Grot. de Jure Belli, lib. 2. c. 2. sec. 10.

[*z*] *Delmada v. Motteux*, B. R. Mich. 25. Geo. 3. *Lever v. Fletcher*, Park 237.

[*a*] *Potts v. Bell*, 8 T. R. 548. *Vandyck v. Whitmore*, 1 East's R. 475.

[*b*] *Brandon v. Nesbitt*, 6 T. R. 23. *Bristow v. Towers*, 6 T. R. 35.

finally settled in the negative by the unanimous decisions of the Court of King's Bench, in recent cases.

An underwriter on French property in time of peace is not liable for a loss occasioned by capture by the king's ships during hostilities which commenced between Great Britain and France, subsequent to the policy being effected, and terminated prior to the action brought.(c)

There is one species of insurance which never could be made upon the ships or goods of an enemy, or even of a subject, and that is, upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them ; or upon ammunition, other warlike stores, or provisions ; because, from the nature of these commodities, they are absolutely prohibited by the laws of all nations.

Thus all insurances upon a voyage generally prohibited by law, such as to an enemy's garrison, or upon a voyage directly contrary to an express act of parliament, or to royal proclamation in time of war, are absolutely null and void.

Colonial produce cannot legally be shipped from the British West Indies for Gibraltar,(d) and there-

[c] *Gamba and another v. Le Mesurier*, 4 East 407.

[d] *Lubbock v. Potts*, 7 East 449.

fore the same cannot be insured on such a voyage, and it matters not that part of the cargo was shipped at one of the West India islands, with liberty to exchange it at another (which would have been legal) if in fact it were not exchanged, and its ultimate destination was Gibraltar ; and the ship and cargo being lost off Gibraltar ; though the assured could not recover, yet the premium having been paid upon an illegal insurance, cannot be recovered back.

Quer. Whether an insurance of a *British ship* against "*British capture, seizure, and detention* be illegal and void, as such a capture, &c. may be "*without lawful authority.*"

III. 8. *Of Enemy's Ships, &c.*

The principle of law which operates against insurance of enemy's goods, as stated under the preceding head, militates against the insuring of enemy's ships ; and the reason for rendering such insurances illegal, is so obvious that no question on this head has ever arisen for discussion in any of our courts of law. But enemy's ships taken and condemned as lawful prize, may thereby become entitled to the privileges and advantages of British ships, under the regulations of the register acts, and 45 G. 3. c. 32.

III. 9. *Of Prohibited Goods and Commerce.*

All insurances made to protect the importation or exportation of certain commodities, declared to be illegal, are contrary to law, and therefore void ; and no insurance, although made in general terms, can comprehend prohibited goods ; and therefore when the assured shall procure such commodities to be shipped, *the underwriter being ignorant of it*, by means of which the ship and cargo are confiscated, the insurer is discharged. Goods are said to be prohibited or contraband, when the importation or exportation of them is absolutely forbid by law, from motives of commercial policy. Such are many foreign manufactures, the importation of which is wholly prohibited, with a view of encouraging similar manufactures of our own. The exportation of wool, and other raw materials, tools, and machinery employed in manufactures, is also prohibited from similar motives. Most other articles of commerce are allowed to be imported or exported, subject to certain duties or customs ; and when prohibited goods, or goods on which the duties have not been duly paid, are attempted to be imported or exported, they are usually called *smuggled or run goods*.

And a custom having prevailed to a very alarming degree, of importing great quantities of goods from

foreign states in a fraudulent and clandestine manner, without paying the customs and duties payable to the Crown, which had encouraged and caused some evil-minded men to become insurers to deliver such goods so clandestinely imported, at their charge and hazard into the houses, &c. of such owner, to remedy which mischief a law was enacted, and a penalty of 500*l.* imposed on persons insuring to import prohibited goods.(*e*)

Wool being the staple manufacture of this kingdom, it was always deemed a heinous offence to transport it out of the realm, and was forbidden by the common and statute laws,(*f*) and any offences against it have met with corporal and pecuniary punishments. This being the case, an insurance upon wool so to be exported, must have been void; because the very foundation of the contract was contrary to law. But notwithstanding these restrictions, the practice of exporting wool became so frequent, as well as the practice of insuring such cargoes, and undertaking to deliver them safely aboard, that it became necessary to enact a new law,(*g*) rendering void any policies of insurance thereon, and imposing a heavy penalty to check the growing evil. And a subsequent statute(*h*) reduces all the

[*e*] 4 & 5 W. & M. c. 15. sec. 14, 15, 16. and 8 & 9 W. 3. c. 36. sec. 1.

[*f*] Mir. c. 1. sec. 3. 11 Ed. 3. c. 1. 8 Eliz. c. 3. 12 Car. 2. c. 32. 7 and 8 W. 3. c. 28. 4 Geo. 1. c. 11.

[*g*] 28 Geo. 2. c. 21. sec. 29. and sec. 33.

[*h*] 28 Geo. 3. c. 38. sec. 45.

laws relative to the exportation of wool into one statute, inflicting a penalty of 50*l.* and six months solitary imprisonment for the first offence,⁽ⁱ⁾ with a penalty upon the persons paying for such insurance, and annulling all policies made thereon.^(k)

All insurances made in order to protect smuggled goods, or in contravention of the navigation acts, are void, and of no effect; so are such as are made on goods contraband of war.^(l) It has however been ruled in our courts, that one nation never takes notice of the revenue laws of another,^(m) and therefore an insurance upon goods, the exportation and importation of which are forbidden by the laws of other countries, is good and valid in this: And every policy upon goods, the exportation and importation of which is not prohibited by the municipal laws of this country, or by the general laws of nations, is legal and binding upon the parties; and the underwriter must answer for every loss arising by means of any of the usual perils.

And this doctrine has been carried so far, that an insurance upon a voyage, in which it was intended to defraud the revenue of a foreign state, was holden not to be illegal, though fictitious papers were fabricated for the purpose of facilitating the fraud.⁽ⁿ⁾

[i] 28 Geo. 3. c. 38. sec. 46. [k] *ibid.* sec. 48.

[l] Park 255. [m] Doug. 238.

[n] *Planche v. Fletcher*, Doug. 238.

But an insurance on any commerce, contrary to the laws of the dependencies of the crown of this kingdom is void. And an insurance on a voyage to the East Indies, in contravention of the 9th and 10th Will. & M. c. 44. is void, though the penalties of that statute has been repealed by a recent act.(o)

And where a ship was employed to carry convicts, stores, &c. to New South Wales, the owners obtained a licence from the India Company to sail thither, and from thence to Bombay, there to purchase a cargo of cotton and return to London;(p) but stipulated that no other trade should be carried on. The owners, however, sent articles not authorised by the licence, with directions to proceed to Goa, and sell them there, or at Bombay, which rendered the insurance made on this ship void, as it was effected on a trade undertaken with a view to break in upon the Company's monopoly.

If a foreign ship, trading to the British settlements in India, under a treaty, violate any of the regulations of such treaty, it will avoid any policy on her.(q) But a policy on a legal cargo is not vitiated by the ship's having *previously* acted in contravention of the treaty.

[o] 33 Geo. 3. c. 52 sec. 146.

[p] Camden and others v. Anderson, 6 T. R. 723. and 1 Bos. & Pull. 272.

[q] Marshall, c. 3. sec. 2. p. 52.

And where an American ship at Bombay took in goods for China, contrary to the American treaty ;(r) and with the proceeds of these goods purchased a cargo at Canton for Hamburg. A policy on the ship *at and from Canton to Hamburg*, was held to be void, because the illegal cargo was on board part of the time the ship remained at Canton; and this insurance would not protect the ship on her voyage to Hamburg with another cargo. But a policy on the *goods* from Canton to Hamburg was held to be good, though purchased with the proceeds of the illegal cargo; and the insurance on the voyage from Canton was deemed legal, though the ship had been liable to seizure in the voyage from Bombay to Canton.

III. 10. *Of Return of Premium, in cases of void or fraudulent Policies. &c.*

In all countries in which insurances have been known, it has been a custom coeval with the contract itself, that where property has been insured to a larger amount than the real value, the insurer shall return the overplus premium;(s) or if it happen that goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned.(t) If the ship be arrived before the policy is made, and the underwriter is acquaint-

[r] Bird v. Appleton, 8 T. R. 562.

[s] Loccenius de Jure Marit. 2. c. 5. sec. 8.

[t] 1 Mag. 90.

ed with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it usually is) *lost or not lost*, it has been held in that case the underwriter should retain: because under such a policy, if the ship had been lost, at the time of subscribing, he would have been liable to pay the amount of his subscription. The parties themselves frequently insert clauses in the policy, stating, that upon the happening of a certain event, there shall be a return of premium.^(u) These clauses have a binding operation upon the parties; and the construction of them is a matter for the Court, and not for the jury to determine. In short, if the ship, or property insured, was never brought within the terms of the written contract,^(x) so that the insurer never has run any risk, the premium must be returned.

The principle upon which the whole of this doctrine depends, is simple and plain, admitting of no doubt or ambiguity. The risk or peril is the consideration for which the premium is to be paid: if the risk be not run, the consideration for the premium fails;^(y) and equity implies a condition that the insurer shall not receive the price of running a risk; if, in fact, he runs none.^(z) It is just like a contract of bargain and sale; for if the thing sold be

[u] Dougl. 268.

[x] 1 Vezey 319.

[y] Pothier, n. 179.

[z] 3 Burr. 1240.

not delivered, the party who agreed to buy is not liable to pay. Thus to whatever cause it be owing that the risk is not run, as the money was put into the hands of the insurer, merely for the risk of indemnifying the insured, the purpose having failed, he cannot have a right to retain the sum so deposited for a special cause; and should he refuse to refund such premium, the law in such case implies a debt, *quasi ex contractu*, and gives the insured an action against the insurer, for money had and received to his use, to recover back the premium.(a)

In a policy where a clause was inserted that 8*l.* per cent. of the premium,(b) should be returned if the ship sailed from the West India Islands, with convoy for the voyage, and arrives, the court held, that the arrival of the ship, whether with or without convoy, entitled the party to a return of premium.

So also, though there has been a *capture* and *re-capture*, during the voyage insured.(c)

And in a recent case in the Common Pleas,(d) there was the following clause for a return of premium in a policy "at and from *Oporto to Lynn*, "with liberty to touch at any ports on the coast of " *Portugal*, to join convoy, particularly at *Lisbon*,

[a] 2 Burr. 1008. Dougl. 454. Cowp. 668. 1 Show. 156. 3 T. R. 266.

[b] Symond and another v. Poydell, Dougl. 225.

[c] Aguilar and others v. Rodgers, 7 T. Rep. 421.

[d] Audley v. Duff, 2 Bos. Pull. 211.

“ to return 6*l.* per cent. if she sail with convoy from the coast of Portugal, and arrive.” The ship sailed from Oporto under the protection of a sloop of war and a cutter appointed to protect the trade of that place to Lisbon from whence it was to sail under a larger convoy to England. In the way to Lisbon, the fleet was dispersed, and this ship ran for England, and arrived. It was contended that this ship had not sailed from the coast of Portugal with convoy. But the Court held, that having sailed from Oporto, with a convoy duly appointed, with a *bona fide* intention to proceed to England, though, by desire of the admiral, Lisbon was to be taken in the way, the condition on which the return of premium was to be made, had been performed.

It is held, that whether the cause of the risk not being run is attributable to the *fault, will, or pleasure* of the insured, the premium is to be returned.(*e*) But if the risk has once commenced, there shall be no apportionment or return of premium afterwards.(*f*) Therefore no return in deviations.

And where a policy is void as a wager policy,(*g*) the Court will not allow the insured to recover back the premium.

[*e*] Cowp. 668.

[*f*] Hogg v. Horner, Sittings at Guildhall after Mich. 1797.

[*g*] Lowry and another v. Bourdieu, Dougl. 468.

Nor in the case of a re-assurance,^(h) void by the statute of the 19th of George the 2d. ch. 37.

And where a policy is made to cover a *trading with the enemy*, the insurance is void, and the assured cannot recover the premium.⁽ⁱ⁾

But if there are two distinct points of time, or, in effect two voyages either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy. Thus it was held in an insurance^(k) “at and from London to Halifax, warranted to depart with convoy from Portsmouth;” when the ship arrived at Portsmouth the convoy was gone. The premium for the voyage from Portsmouth to Halifax was returned.

But where a ship was insured for twelve months,^(l) at 9*l.* per cent. warranted free from American captures: The ship was taken within two months by the Americans; no return of premium was allowed, because the contract was entire; and the premium or gross sum stipulated and paid for twelve months.

[h] *Andree v. Fletcher*, 3 T. R. 266.

[i] *Vandyck v. Hewitt*, 1 East 96. *Potts v. Bell*, 8 T. R. 548.

[k] *Stevenson v. Snow*, 3 Burr. 1237. and 1 Blac. 318. S. C.

[l] *Tyrie v. Fletcher*, Cowp. 666.

So also it was held where a ship insured for twelve months was taken at the end of two, *(m)* though the whole premium of 18*l.* was acknowledged to be received *at the rate of 15s. per month*; for that is only a mode of computing the gross sum.

When the contract is entire, whether it be for a specified time, or for a voyage, there shall be no apportionment or return, if the risk has once commenced. *(n)* Where the premium is entire in a policy on the voyage, where there is no contingency at any period out or home, upon the happening of which the risk is to end, nor any usage established upon such voyage; though there be several distinct ports, at which the ship is to stop, yet the voyage is one; and no part of the premium shall be recoverable.

It was so held *(p)* where a ship was insured "*at* and from *Jamaica*, warranted to sail on or before the 1st of *August*, to return 8 *per cent.* if she sailed with convoy." The ship did not sail till September. There shall be no return upon the warranty of the time of sailing; for the Court cannot make a distinction between the risk *at*, and the risk *from*.

[*m*] *Lorraine v. Thomlinson*, Dougl. 585.

[*n*] *Bermen v. Woodbridge*, Dougl. 781.

[*p*] *Meyer v. Gregson*, B. R. East 24 G. 3.

It is otherwise if the jury find an express usage upon the subject of return of premium.^(q) It seems that there never has been an apportionment, unless there be something like an usage found to direct the judgment of the Court.

If the insured have a contingent insurable interest in the thing insured, at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured.^(r)

If the question of a return of premium be not agitated at the trial of a cause to recover a loss,^(s) and a verdict be taken for the plaintiff for the loss, subject to the opinion of the Court upon any point that may be reserved, and that point be decided against the plaintiff; it will be too late then to set up his claim to a verdict for the premium; for the Court cannot find a new verdict, or substitute any other sum in lieu of that which the jury gave in damages.

A clause in a ship policy,^(t) at and from Lisbon to Cadiz, and at and from thence to Flushing, at a premium of 20*l. per cent.* to return 8*l.* if the ship insured sailed with convoy from Cadiz for England,

[q] Long v. Allen, B. R. East T. 25 G. 3.

[r] Boehm and others v. Bell, 8 Term Rep. 154.

[s] R. Nesbit v. Whitmore, 1 East 97. n.

[t] Kellner v. Le Mesurier, 4 East 396.

and *2l. per cent.* more for convoy from England to Flushing, or *10l. per cent.* if with convoy for the voyage *and arrived*, does not entitle the assured to a return of premium of *8l. per cent.* in consequence of the ship's arrival merely in England, with convoy from Cadiz, being afterwards captured before her arrival at Flushing; for *arrived* means *at the ultimate port of destination.*

Quer. If no interest be averred, it is sufficient under the stat. Geo. 2. c. 37. sec. 2. to state that the ship was foreign when the policy was underwritten, and the loss happened without stating the ship to be such when the risk commenced. (u)

A premium having been paid upon an illegal insurance, cannot be recovered back. (x)

[u] *Kellner v. Le Mesurier*, 449.

[x] *Lubbock v. Potts*, 7 East 4 East 396.

IV. OF BOTTOMRY AND RESPONDENTIA.

THE contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment : and it is understood, that if the ship be lost, the lender also loses his whole money ;(y) but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual, or legal rate of interest. When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. But when the loan is not made upon the vessel,(z) but upon the goods and merchandize laden thereon, which from their nature must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. In this consists the difference between *bottomry* and *respondentia*, that the one is a loan upon the ship, the other upon the goods : in the former the ship and tackle are liable, as well as the person of the borrower : in the latter, for the most part, recourse must be had to the *person* only of the *borrower*.

[y] 2 Blackst. Com. 457.

[z] Ibid. 458.

Another observation is, that in a loan upon bottomry, the lender runs no risk though the goods should be lost; (a) and upon *respondentia* the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects, the contract of bottomry, and that of *respondentia*, are upon the same footing; the rules and decisions applicable to one, are applicable to both; and therefore, in the course of our inquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.

These terms are also applied to another species of contract, (b) which does not exactly fall within the description of either; namely to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself; as if a man lend 1,000*l*. to a merchant, to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed: which agreement is sometimes called *fœnus nauticum* or *usura maritima*. But as this species of bottomry (c) opened a door to gaming and usurious contracts, especially in long voyages, the legislature at the time it suppressed insurances upon wagering policies, introduced a clause by which it was enacted, (d) “That all sums of money lent on bottomry

[a] 2 Valin. Com. p. 4. [b] 2 Blackst. Com. 458. 1 Siderfin, 27.

[c] Molloy, lib. 2. c. 11. sect. 8. [d] 19 Geo. 2. c. 37. sect. 5.

or at *respondentia* upon any ship or ships belonging to his Majesty's subjects, *bound to or from the East Indies*, should be lent only on the ship, or on the merchandize or effects, laden or to be laden on board of such ship, and should be so expressed in the condition of the said bond; and the benefit of salvage should be allowed to the lender, his agents or assigns, who alone should have a right to make assurance on the money so lent; and no borrower of money on bottomry, or at *respondentia*, shall recover more on any assurance than the value of his interest in the ship, or in the merchandizes and effects laden on board thereof, exclusive of the money so borrowed; and in case it should appear that the value of his share in the ship, or in the merchandizes and effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender, for so much of the money borrowed, as he had not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandizes should be totally lost."

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far at least as relates to *India* voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*,

these loans may be made in all other cases, as at the common law, except in the following instance, which is another statute-prohibition. The statute alluded to declares,^(e) that all contracts made or entered into by any of his Majesty's subjects, or any persons in trust for them, for or upon the loans of any money by way of bottomry, on any ship or ships in the service of foreigners, and bound or designed to trade in the *East Indies* or *parts aforesaid*, shall be null and void.

This act, it should seem, does not mean to prevent the King's subjects from lending money on bottomry, on foreign ships trading from their own country to their settlements in the East Indies. The purpose of the statute was only to prevent the people of this country from trading to the British settlements in India, under foreign commissions, and to encourage the lawful trade thereto.

It lately became a question in the court of Common Pleas, whether an American ship since the declaration of American independence, was a *foreign* ship, within the statute of the 7 Geo. 1. c. 21. sec. 2. It came before the Court,^(f) upon a motion to discharge the defendant out of custody, upon entering a common appearance. The defendant was held to bail upon a *respondentia* bond, which was executed by the defendant, who was an American, to secure

[e] 7 G. 1. c. 21. sect. 2.

[f] Sumner v. Green, 1 H.B. 301.

the payment of a cargo shipped by the plaintiff, on board an American ship in the East Indies, homeward bound from Calcutta to Rhode Island in America. The ship had sailed from England, and landed a cargo of European goods in Bengal, previous to her taking in the cargo, on which the bond was given.

The Court were much inclined to think the bond was void, the case being within the mischief designed to be remedied by the act. But as the question was of considerable consequence, they thought it not proper to be discussed on this summary application: but they ordered the defendant to be discharged, on the ground, that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void on which the action was founded, it would be wrong to detain the defendant in prison: more particularly as the plaintiff would, by such means, have an opportunity of tampering with the defendant in prison, and of escaping from the penalties of the act, by preventing the case from being brought before the Court.

A loan upon the voyage, without a security on the ship or goods, is entirely prohibited by the laws of France; for in the marine ordinances of that country, there is a *general* regulation similar to that made here with respect to India ships: “Faisons defenses de prendre deniers, a la grosse sur le corps et quille du navire(g) ou sur le marchandises de son charge-

[g] Ord. de Lou. 14. tit. de Contrats a grosse Avent. art. 3.

ment, *au dela le leur valeur* au peine d'être contraint; *en cas de fraude* au paiement des sommes entiers non obstant la perte ou prise du vaisseau." And in another part it is said, (h) that where a greater sum is borrowed than the ship or goods are worth, the contract is void, except as to the amount of the real value of the ship or goods. If then the contract be only binding, as far as there is property to answer the loan, it follows that, by the laws of France, this contract cannot exist upon the hazard of the voyage merely, unless there be a security also upon the ship or goods.

The contract of bottomry and *respondentia*, (i) seems to deduce its origin from the custom of permitting the master of a ship, when in a foreign country, to hypothecate the ship, in order to raise money to refit. Such a permission is absolutely necessary, and is impliedly given in the very act of constituting him master, (k) not indeed by the common law, but by the marine law, which in this respect is reasonable; for if a ship happen to be at sea, and spring a leak, or the voyage is likely to be defeated for want of necessaries, it is better that the master should have it in his power to pledge the

[h] Loc. cit. art. 15.

[i] 1 Blackst. Com. 457.

[k] *Barnard v. Bridgman*, Moor, 918. fully reported in Hobart, p. 11.

ship and goods,^(l) or either of them, than that the ship should be lost, or the voyage defeated.⁽ⁿ⁾ But he cannot do either for any debt of his own: but merely in case of necessity, and for completing the voyage. Although the master of the vessel has this power while abroad, because it is absolutely necessary for the purposes of commerce and navigation; yet the very same authority which gave that power in those cases, has denied it when he happens to be in the same place where the owners reside. Thus the laws of Oleron, in the place above cited, speak of the captain being in a foreign country, and first writ-

[l] That the master might hypothecate the goods, as well as the ship, in cases of necessity, depended till lately more upon a general understanding that such hypothecation might be made, than upon any very direct authority upon the point. In a note to a case in Salkeld (*Justin v. Ballam*, 1 Salk. 34.) it is said the master may hypothecate either ship or goods; for the master is intrusted with both, and represents the traders, as well as the owners of the ship.

But in a late case in the High Court of Admiralty in England,^(m) this question has undergone all that elaborate and learned discussion which the abilities of the advocates of that court were so competent to afford it; and has met with a decision, confirming the above note of *Justin v. Ballam*, formed upon mature deliberation and solid argument, as will appear from the judgment pronounced by the eminent person who presides in that court. The extent of that decision seems to be this, that the master of a vessel, carrying a cargo on freight, may, in a foreign port, hypothecate that cargo for repairing damages sustained by the ship at sea; such repairs being absolutely necessary for the purpose of delivering the cargo, according to the charter party.

[m] The ship *Gratitude*, 3 Robinson's Adm. Rep. p. 240.

[n] Molloy, b. 2. c. 2. Sect. 14. Leg. Oler. art. 1. c. 22.

ing home to his owners for money, before he takes money on bottomry: and the laws of the Hanse Towns,(o) which were founded on those of Oleron, speak the same language; for they say, “ a master being in a *strange country*, if necessity drive him to it, may take up money on bottomry, if he cannot get it without; and the owners shall bear the charge.” In addition to this,(p) from all the cases which have been determined at the common law upon the subject, it may be inferred that the ship should be abroad, as well as in a state of necessity, to justify the captain or master in taking the money on bottomry. Molloy, in express terms,(q) declares, that a master has no power to take up money on bottomry, in places where his owners dwell; otherwise he and his estate must be liable thereto. If, indeed, the owners do not agree in sending the ship to sea, the majority shall carry it,(r) and then money may be taken up by the master, on bottomry, for their proportion who refuse, although they reside upon the spot, and it shall bind them all. The two last rules are the same with the Marine Ordinances of France,(s) upon that point: for they also declare, that those who lend money to the master, in the place where the owners reside, without their consent, shall have no security or hypothecation, but on such part of the ship only as belongs to the master him-

[o] Laws of the Hanse Towns, art. 60.

[p] Hobart, 11. Noy, 95. [q] Molloy, l. 2. c. 11. sec. 11.

[r] Molloy, Loc. cit.

[s] Ord. of Lou. 14 tit. Avant a la grosse, art. 8. c. 9.

self, even though the money was advanced for repairs, or for purchasing provisions. But that the shares of those owners, who refuse to send out the ship, shall be affected by the loan of money to the master for necessaries.(t) The justice and propriety of such a regulation, are evident, from considering that such a contract was only intended for the benefit of all parties in those places where the owners had neither a residence, nor any correspondents.

The contract of which we treat is of a different nature from almost all others : (u) But that which it most resembles is the contract of insurance : for the lender on bottomry, or at *respondentia*, runs almost the same risks, with respect to the property, on which the loan is made, that the insurer does with respect to the effects insured. There are, however, some considerable distinctions ; for instance, the lender supplies the borrower with money to purchase those effects upon which he is to run the risk : not so with the insurer. There are also various other distinctions.

But however similar they may be in other respects, they differ very much in point of antiquity. The traders of the ancient world were perfectly acquainted with *bottomry* and *respondentia*, or what was equivalent thereto. In those fragments of the fa-

[t] 2. Valin. Com. 10.

[u] Pothier, Tr. du, pret à la grosse Avant. not. 6.

mous sea-laws of the Rhodians which have been preserved and transmitted to our times, there are evident traces of this species of contract. In one section it is said,(x) "that when masters of ships, "who are proprietors of one third of the lading, "take up money for the voyage, whether for the "homeward bound, or both; all transactions shall "pass according to the writings drawn up between "the master and lender, and the lender shall put "a man on board the ship to take care of his loan." But in another place these laws speak more explicitly, and with a direct reference to the distinction between naval interest and that which is given for a land risk.(y) "If masters or merchants borrow "money for their voyages, the goods, freights, "ships, and money being free, they shall not make "use of suretyship, unless there be some apparent "danger either of the sea or of pirates. And for "the money so lent, the borrowers shall pay *naval* "interest." From these two quotations, little doubt can be entertained but that the *Rhodians* used to borrow and lend, upon the hazard of the voyage, for an increased premium. The Rhodian laws were unquestionably adopted by the Romans; and consequently that branch of them, which relates to bottomry amongst the rest; for you can hardly open a book upon the Roman law, but you meet with chapters,(z) *de nautico fœnore, de nauticis usuris*, which

[x] Leg. Rhod. s. 1. art. 21. (y) Leg. Rhod. s. 2. art. 16.

(z) Digest, lib. 22. tit. 2. Cod. lib. 4. tit. 33.

plainly shew that this contract was well known to the jurists of that distinguished nation. It was also called by them *pecunia trajectitia* ; because it was given to the borrower to be employed by him in commerce upon and beyond the sea. It appears by *Valin*,^(a) that some writers of the French nation had supposed, that this contract was wholly unknown to the ancients, and that it was peculiar to France alone. Valin very clearly exposes the absurdity of such an idea ; and it seems to be sufficiently answered, if deserving of an answer, by what has been already said. In addition to this we may add, that so far from being peculiar to France, it has obtained a place in the codes of all the maritime states, whose laws have been promulgated, or have been at all famous in the modern world. In this part of the compendium, two passages from the judgments, or laws of Oleron,^(b) upon the subject, as well as the 60th article of the laws of the Hanse Towns : and by a reference to the 45th article of the laws of Wisberg,^(c) it will be found that the nature of bottomry, as well as its name, was perfectly known to the makers of those ordinances.

In defining bottomry, it has been said, that if the ship arrive safe, the lender shall be paid his principal, and the stipulated interest due upon it, however much it exceeded the legal rate. The true principle, upon which this is allowed,^(d) is not

[a] 2 Valin Com. 1. [b] Art. 1. & 2.

[c] Laws of Wisberg, art. 45.

[d] Molloy, lib. 2. c. 11. s. 8. 13. 2 Ves. 148.

merely the great profit and convenience of trade, as has frequently been urged; but the risk which the lender runs of losing both principal and interest; for he runs the contingency of winds, seas, and enemies. It is therefore of the essence of a contract of bottomry(*e*) that the lender runs the risk of the voyage; and that both principal and interest be at hazard; for if the risk go only to the interest or premium and not to the principal also, though a real and substantial risk be inserted, it is a contract against the statute of usury, and therefore void.(*f*) This has been frequently so determined in our courts of law; and it is consonant to the idea of foreign writers.(*g*)

An action of debt was brought upon an obligation.(*h*) The defendant pleaded the statute of usury, and shewed, that a ship went to fish in Newfoundland, (which voyage might be performed in eight months) and that the plaintiff delivered 50*l.* to the defendant to pay 60*l.* upon the return of the ship to Dartmouth: and if the ship by occasion of breakage should not return from Newfoundland to Dartmouth, then the defendant should pay the 50*l.* only; and if the ship never returned, he should pay nothing. And it was held by all the Court not to be usury within the statute. For if the ship had staid at

[*e*] 2 Ves. 154. [*f*] 12 Ann. st. 2. c. 16.

[*g*] Pothier, not. 16.

[*h*] Sharply v. Hurrell, Cro. Jac. 208.

Newfoundland two or three years, he should have paid at the return of the ship but 60%. and if the ship never returned, then nothing; so that the plaintiff ran the hazard of having less than the interest which the law allows; and possibly neither principal nor interest.

This case was, upon another occasion, *(i)* mentioned in argument by one of the judges on the bench; the principle, on which it was decided, was recognized, and the case itself allowed to be law.

So also in another case *(k)* of debt upon an obligation, conditioned to pay so much money if such a ship returned within six months from Ostend in Flanders to London, which was more by the third part than the legal interest of money; and if she do not return then the obligation to be void; the defendant pleaded that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and avers that the obligation was entered into by coven, to evade the statute of usury, and the penalty thereof: upon this averment the plaintiff took issue, and

[*i*] *Roberts v. Tremayne*, Cro. Jac. 508.

[*k*] *Joy v. Kent*, Hard. Rep. 418.

the defendant demurred.(*l*) Held not to be within the statute of usury.

In another case(*m*) of debt upon an obligation for 300*l*. the condition was, that if such a ship went to Surat in the East Indies, and returned safe ; or if the owner, or the goods laden on board the ship returned safe, then the defendant was to pay the principal to the plaintiff, and 40*l*. for each 100*l*. ; but that if the ship should perish by unavoidable casualties of sea, fire, or enemies, to be proved by sufficient testimony, then the plaintiff should have nothing. The doubt was, whether this was an usurious contract ; and it was said to be so, because the payment depended upon so many things, one of which in all probability would happen. But the whole court held it not to be within the statute.

These cases are all uniform in the principle which they go to establish, that on account of the risk, the interest shall be larger than the common rate : but notwithstanding this, a case is to be found in the Equity Reports, which directly tends to destroy the rule of decision in all these cases.

A part owner of a ship(*n*) borrowed money of a plaintiff upon a bottomry bond, payable on the return of the ship from the voyage she was then going

[*l*] Park, 5th edit. 417.

[*m*] Soame v. Gleen, 1 Sid. 27. 1 Lev. 54.

[*n*] Dandy v. Turner, 1 Equity Cases, Abr. 372.

in the service of the East India Company, who broke up the ship in the East Indies; and the owners brought their action against the company, and recovered damages, which did not, however, amount to a full satisfaction. The plaintiff brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he was left to recover as well as he could at law; for a court of equity will never assist a bottomry bond, which carries *unreasonable interest*.

This case conveys a very unmerited censure upon bottomry bonds, not at all warranted by the long chain of uniform decisions in their favour. Indeed, from the very nature of the contract, they are to carry naval interest, which is always greater than land interest, in proportion as the risks run by the lender on bottomry are much greater than those which a lender upon common bond incurs.

If a contract were made by colour of bottomry in order to evade the statute, it would unquestionably be usurious and void.(o)

And as the hazard to be run is the very basis and foundation of this contract; it follows that if the risk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the statutes of usury

might be evaded. This was so decided in the court of Chancery.

The case(*p*) was upon a bottomry bond, whereby the plaintiff was bound in consideration of 400*l.* as well to perform the voyage within six months, as at six months' end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage. It happened that the plaintiff never went the voyage, whereby the bond became forfeited, and he now preferred his bill to be delivered. Upon the former hearing, as the ship lay all the time in the port of London, and there was no hazard of losing the principal, the Lord Keeper thought fit to decree, that the plaintiff should lose the premium of 40*l.* and be contented with his principal and *ordinary interest*. And now upon a re-hearing, he confirmed his former decree.

Bottomry bonds generally express from what time the risk shall commence, as that the ship shall sail from London to such a port abroad, &c. In such cases the contingency does not commence till the departure: and therefore if the ship receive injury by storm, fire, &c. before the beginning of the voyage the person borrowing alone runs the hazard.^(r) But if the condition be "that if the ship" should not arrive at such a place by such a time,

[*p*] *Deguilder v. Depeister*, 1 Vern. 263.

[*r*] *Beawes Lex. Merc. Red.* 4th edit. p. 127.

“ then,” &c. in these instances, the contract commences from the time of sailing, and a different rule as to the loss, will necessarily prevail.

The amount of the loan on bottomry or respondentia, in this country, is not restrained by any regulation whatever ; although it is in many maritime states by express ordinances : that the only restriction in the laws of England is with respect to money lent on ships and goods going to the East Indies, which, by statute,^(s) must not exceed the value of the property on which the loan is made. It remains then to see what those risks are, to which the lender undertakes to expose himself. These are for the most part mentioned in the condition of the bond, and are nearly the same against which the underwriter in a policy of insurance undertakes to indemnify. These accidents are tempests, fire, capture, and every other misfortune, except such as arise either from the defects of the thing itself, on which the loan is made, or from the misconduct of the borrower.

It seems to have been a doubt late in the last century,^(u) whether a loss by the attacks of pirates fell within the words perils of the sea ; for it was argued in the King’s Bench, in the reign of *James II.* : But the Court were of opinion that piracy was one of the dangers of the seas.

[s] 19 Geo. 2. c. 37. sec. 50. [u] *Barton v. Wolliford*, Comb. 56.

The lender is answerable likewise for losses by capture; or to speak more accurately, if a loss by capture happen, he cannot recover against the borrower; but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned) the bond is not forfeited and the obligee may recover.

This doctrine was laid down by the whole court of King's Bench, in a case upon a bond of this nature; (x) the proceedings on which were fully stated, when the unanimous opinion of the Court was delivered by Lord Mansfield that the plaintiff (the obligee) was entitled to recover. (y)

From this case we not only learn what shall be deemed a capture, within the meaning of that word in a bottomry bond, but we derive from it a piece of very essential information, namely, that a lender on bottomry or at respondentia, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average. This was expressly said by Lord Mansfield, in delivering the judgment of the Court. His Lordship's opinion is confirmed by the stat. 19 Geo. 2. c. 37. which allows the benefit of salvage to lenders upon ships or goods going to the

[x] *Joyce v. Williamson*, B. R. Mich. Term. 23 Geo. 3.

[y] *Park*, 5th edit. 422.

East Indies; clearly shewing that there was no such thing at the *common law*, otherwise there was no occasion to make such a provision.

In an action on a policy of insurance upon a *respondentia* bond on ship and goods at and from *B.* to *C.*(*x*) The ship was Danish, and an average loss was sustained upon the goods to the amount of 6*l.* 15*s.* *per cent.* and the plaintiff as a holder of a *respondentia* bond, had been called upon to contribute; and now brought his action against the English underwriters for the amount of that contribution; held that the plaintiff was entitled to recover, because by the law of Denmark lenders upon respondentia are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them.

An action of debt was brought upon an obligation for performance of covenants in an indenture wherein it was recited, that such a ship was in the service of the East India Company, and it was to obey such orders as they or their factors should give, (*a*) and that she was designed for a voyage to China or Formosa. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from London to Bantam and returned from thence directly to London 550*l.* : if from Lon-

[*x*] *Walpole v. Ever*, Sitt. aft. Trin. 1789.

[*a*] *Weston v. Wildy*, Skinn. 152.

don to Bantam, and from thence to China or Formosa, and returned to London within twenty-four months, 650*l*. If she returned not within twenty-four months, then to pay 5*l*. per month above 650*l*. till the thirty-six months; and if she returned not within thirty-six months, then to pay 710*l*.; unless it can be proved by Wildy, that the ship returned not, but was lost, within thirty-six months. The ship in fact went from London to Bantam and from thence to Surat, and other parts, and so returned to Bantam; and in her voyage from Bantam to London, was lost within thirty-six months: upon which this present action was brought.

The Court inclined to be of opinion, that this ship having deviated from the voyage described, in going to Surat, the plaintiff was not to bear the loss, and was consequently entitled to recover.

In another case (*b*) of debt upon a bottomry bond, the defendant pleaded that the ship went from London to Barbadoes *sine deviatione*, and afterwards she returned from Barbadoes towards London, and in her return was lost *in voyage prædita*; the plaintiff replied that the ship in her return went from Barbadoes to Jamaica; and that after a stay there she returned from Jamaica towards London, and was lost, and so shews a deviation. The defendant rejoined that she was pressed into the King's service, and so was compel-

[*b*] Williams v. Steadman, Holt's Rep. 126. Skin. 345. S. C.

led to go to Jamaica, which was the deviation pleaded by the plaintiff; without this that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant was not good; for he pleaded that the ship went from London to Barbadoes without deviation, and that in the return she was lost in the voyage aforesaid; but it does not shew *without deviation*. Now the condition is so in express words, and he ought to shew expressly that he has performed the words of the condition.

The same rule of decision has been adopted in the courts of Equity.(c)

The plaintiff entered into a penal bond to pay 40s. per month for 50*l.* the ship was to go from *Holland to the Spanish Islands and to return to England*: but if she perished the defendant was not to lose his 50*l.* The ship went accordingly to the *Spanish Islands*, took in *Moors at Africa*, then went to *Barbadoes*, and perished at sea. The plaintiff being sued at law upon the bond, came into equity, suggesting *that the deviation was through necessity*. But his bill was dismissed except as to the penalty.

It frequently happened, as appears by the preamble to 19 Geo. 2. c. 32. that the borrowers on

[c] 1 Eq. Cases Abr. 372. 2 Ch. Cases, 130.

bottomry or at respondentia became bankrupts after the loan of the money, and before the event happened, which entitled the lender to re-payment; by which means the debt could not be proved under the commission, and the lenders were left to such redress as they could obtain from the bankrupt, who had previously given up every thing to his other creditors. This being likely to prove a discouragement to trade, parliament was obliged to interpose, and it was accordingly in the second section of the above statute, “ That the obligee in any bottomry or respondentia bond, made and entered into upon a good and valuable consideration, *bona fide*, should be admitted to claim, and *after the contingency should have happened, to prove his or her debt or demands in respect of such bonds, in like manner as if the contingency had happened before the time of the issuing the commission of bankruptcy against such obligor*, and should be entitled unto, and should have and receive a proportionable part, share, and dividend of such bankrupt’s estate, in proportion to the other creditors of such bankrupt, in like manner as if such contingency had happened before such commission issued: and that all and every person or persons, against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts owing by him, her, or them, on every such bond as aforesaid, and should have the benefit of the several statutes now in force against

“bankrupts, in like manner, to all intents and purposes, as if such contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission.”

By the 16 Cha. 2. c. 6. s. 12. it is enacted, “That if any captain, master, mariner, or other officer belonging to any ship should wilfully cast away, burn, or destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon;” which statute was made perpetual by 22 and 23 Cha. 2. c. 11. s. 12.

As the commerce of the country increased to an amazing degree, so the custom of lending money on bottomry became also very prevalent: and as the lenders had subjected themselves to great risks, they began to think it necessary to protect their property, by insuring to the amount of the money lent. By the decision of the case of *Glover v. Black*,^(d) however, it became necessary to insert in the policy that the interest insured was bottomry or respondentia, and such is the law and practice of merchants at this time.

In a respondentia bond,^(e) the condition, after reciting that the money was lent *upon the goods laden and to be laden* on board a certain ship on her voyage

[d] 3 Burr. 1394. [e] *Bush v. Fearon and others*, 4 East 319.

out and home, was, that if the ship should proceed on her voyage and return within thirty-six months, (the dangers of the seas excepted) and if the borrower, within thirty days after her arrival, should pay to the lender the sum agreed on, or if in the voyage, and within the said thirty-six months, the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void ; held, that this was no more than a *personal* obligation from the borrower to the lender, and did not give the latter any *specific* pledge or *lien* on the home cargo or the proceeds thereof.

V. OF INSURANCE UPON LIVES.

AN insurance upon life is a contract, by which the underwriter for a certain sum, proportioned to the age, *(a)* health, profession, and other circumstances of the person whose life is the object of insurance, engages that that person shall not die within the time limited in the policy; or if he do, that he will pay a sum of money to him in whose favour the policy was granted. Thus, if *A* lend 100*l.* to *B*, who can give nothing but his personal security for repayment; in order to secure him in case of his death, *B* applies to *C* an insurer, to insure his life in favour of *A*, by which means if *B* die within the time limited in the policy, *A* will have a demand upon *C* for the amount of his insurance.

The advantages resulting from such insurances are many and obvious; *(b)* and most of them may be reduced under the following classes. To persons possessed of places or employments for life; to masters of families and others, whose income is subject to be determined, or lessened, at their respective deaths; who by insuring their lives may secure a sum of money for the use of their families. To married persons where a jointure, pension, or annuity,

[*a*] 1 Postlethw. Dict. of Tr. p. 150.[*b*] 1 Postlethw. 150.

depends on both or either of their lives, by insuring the life of the persons entitled to such annuity, pension, or jointure. To dependents upon any other person, during whose life they are entitled to a salary or benefaction, and whose life being insured will enable such dependents, at the death of their benefactor, to claim from the insurers a sum equal to the premium paid. To persons wanting to borrow money, who by insuring their lives are enabled to give a security for the money borrowed. These and many other advantages being so obvious, that the Bishop of Oxford, Sir Thomas Allen, and some other gentlemen, were induced to apply to Queen Anne(c) to obtain her charter for incorporating them and their successors, whereby they might provide for their families in an easy and beneficial manner. Accordingly, in the year 1706, her Majesty granted her Royal Charter, incorporating them by the name of "The Amicable Society for a perpetual Assurance Office;" giving them a power to purchase lands, and ability to sue and be sued in their corporate capacity, and a common seal for the more easy and expeditious management of the affairs of the company.

The benefits which accrued to the public from this species of contract, were found to be so extensive that another office was established by deed, enrolled in the Court of King's Bench, at Westminster, for the insurances of lives only. The name of

this office is the “ Society for Equitable Assurance on Lives and Survivorships.” Besides this, the two companies of the Royal Exchange and London Assurance obtained his Majesty’s charter to enable them also to make insurances on lives. (d) The charter points out the advantages of such institutions ; for it states as the ground on which such a permission is to be granted, “ That it has been found by experience “ to be of benefit and advantage for persons having “ offices, employments, estates, or other incomes determinable on the life or lives upon which such “ office, employments, estates, or incomes are determinable.” (e) Private underwriters also may enter

[d] Park, c. xxii.

[e] An act passed in the 39 Geo. 3. (c. 83.) for incorporating a new insurance company called the Globe Insurance Company, the second section of which authorises them (among other things) to make insurance on the life or lives of any person or persons whomsoever ; and to grant, purchase, and sell annuities for lives or survivorship ; and to grant sums of money, payable at future periods, within the kingdoms of Great Britain and Ireland, and any other parts abroad, whether within his Majesty’s dominions or not ; and shall and may receive deposits of funds of tontine societies, and other institutions, established for granting future advantages, and deposits of funds belonging to, and act as treasurer thereof, for benefit of friendly societies, and other charitable or benevolent institutions ; and make provision for the widows and children of the clergy, and for clergymen ; and receive deposits from or on account of members of the industrious classes of society, and others ; by allowing interest on such deposits made, or otherwise, upon such terms and conditions, and in such manner, as shall or may be agreed upon between the said corporation, so to be created and established, and the persons and societies treating with the said Corporation, for the purposes therein before mentioned.

Since which a number of other Insurance Companies have been established for insurance of lives, &c. &c. &c.

into policies of this nature, as well as any others, provided the party making the insurance chuses to trust their single security.

The antiquity of this practice cannot be very easily ascertained, however, traces of it may be found in very old authors. In the French book, (*f*) entitled *Le Guidon*, we find it ascertained as a contract, perfectly well known, at that time, in other countries. The author of that book, however, tells us in the same passage, that it was a species of contract wholly forbidden in France, as being repugnant to good morals, and as opening a door to a variety of frauds and abuses. Such indeed the law of France continues at this day ; (*g*) and insurance upon lives are prohibited in other countries of Europe by positive regulation. The same French author has however gone a little too far in asserting that the other countries in which they had been till that time encouraged, were also obliged to forbid them. This had not certainly taken place at that time, as may be inferred from the 66th article of the *Laws of Wisbuy* ; and in *England* they never had been prohibited. The learned *Roccus* (*h*) also takes notice of them as legal contracts, and quotes various authors in support of his opinion.

These insurances being thus sanctioned in *England* by royal authority, and the funds of the differ-

[*f*] *Le Guidon* c. 16. art. 5. published in 1661.

[*g*] 2 *Valin* 54. 2 *Magens* 70. *Le Guid.* loc. cit.

[*h*] *Roccus de Assec*, not. 74.

ent societies having very much increased, and being fixed on a stable and permanent foundation,(i) contracts of this nature became so much a mode of gambling (for people took the liberty of insuring any one's life without hesitation, whether connected with him or not, and the insurer seldom asked any question about the reasons for which such insurances were made,) that it at last became a subject of parliamentary discussion. The result of that discussion was, that a statute passed,(k) by which it was enacted, " That no insurance should be made by any person " or persons, bodies politic or corporate *on the life* " *or lives* of any person or persons, or on any other " event or events whatsoever, wherein the person " or persons, for whose use, benefit, or on whose account, such policies should be made, should have " *no interest or by way of gaming or wagering* : and " every insurance made contrary to the true intent " and meaning thereof, should be null and void to " all intents and purposes." And in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain what the interest of the person entitled to the benefit of the insurance really was, it was further enacted by the same statute,(l) " that it should not be lawful to " make any policy or policies on the life or lives of " any person or persons, or other event or events, " without inserting in such policy or policies the " person's name interested therein, or for whose use,

[i] 1 Mag. 33.

[k] 14 G. 3. c. 48, s. 1.

[l] Sec. 2.

“ benefit, or on whose account, such policy was so
 “ made or underwrote. And that in all cases where
 “ the insured had an interest on such life or lives,^(m)
 “ event or events, no greater sum should be recov-
 “ ered or received from the insurer or insurers than
 “ the amount or value of the interest of the insured
 “ in such life or lives, or other event or events.”

It has been held that a person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note.

An action was brought on a policy on the life of *James Russell* from the 1st *June* 1784 to the 1st *June* 1785.⁽ⁿ⁾ Russell was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of 5,000*l.* due from Russell to the plaintiff, for which he had given his note payable in one year from the 14th May 1784. Two objections were made on the part of the defendant: 1st, That part of the consideration for the note was money won at play: 2dly, That Russell at the time he gave the note was an infant.

Mr. Justice Buller nonsuited the plaintiff, upon the ground of part^(o) of the consideration of the note being for a gaming transaction; and therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy, the

[*m*] Sec. 3. [*n*] *Dwyer v. Edie*, London Sitt. after Hil. 1788.

[*o*] Park c. xxii.

interest must be contingent, for Russell might or might not avoid his note; and he much doubted, whether till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection. (*p*)

But a creditor has such an interest in the life of his debtor, that he may insure it, and recover upon the policy. (*q*) Thus in an action on a policy of insurance on the life of Lord Newhaven, from the 1st December 1792 to the 1st December 1793; the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take this case out of the statute 14 Geo. 3. c. 48. It appeared in evidence, that Lord Newhaven was indebted to the plaintiff and a Mr Mitchell in a large sum of money, part of which debt had been assigned by them to another person; the re-

[*p*] There is a case of *Roebuck v. Hammerton*, in which a policy made, in order to decide upon the sex of a particular person, was held to fall within the prohibition of this statute. In another case, a policy having been made on the event of there being an open trade between Great Britain and the province of Maryland on or before the 6th July 1778, Lord Mansfield said, "that it was clear the plaintiffs could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace; but I doubt whether that be an interest within the act. But, 2dly, The policy is void, by not having the name inserted according to the second section of the statute." Cowp. 737. *Mollison v. Staples*, at Guildhall Mich. Vac. 1778.

[*q*] *Anderson v. Edie*, B. R. London Sitt. in Tr. T. 1795.

remainder being more than the amount of the sum insured, was, upon a settlement of accounts between the plaintiff and Mitchell, agreed by them to remain to the account of Mitchell only.

Lord Kenyon was of opinion that this debt was a sufficient interest ; and said, that it was singular that this question had never been directly decided before. That a creditor had certainly an interest in the life of his debtor, the means by which he was to be satisfied, may materially depend upon it, and at all events the death must in all cases in some degree lessen the security. Verdict for the plaintiff.

So also in a previous case,^(r) where an action was brought on a policy on the life of William Holden, from the 17th August 1790 to August 1791, and during the life of the plaintiff's late brother, which policy he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make assurance. Lord Kenyon thought this a sufficient interest in the executor to support the action. The cause proceeded therefore : but the defendant had a verdict afterwards upon a different ground.

The remaining observations and rules upon this subject are very few and short: because those general rules and maxims upon which so much has

[r] *Tidswell v. Angerstein*, Peak, N. P. cases 151.

been said with regard to insurances in general, are also applicable to this species of them, the same mode of construction is to be adopted ; fraud will equally affect the one as the other ; the same attention must be paid to a rigid compliance with warranties, and the same rules of proceeding are to be followed.(s)

With respect to the risk which the underwriter is to run, this is usually inserted in the policy ; and he undertakes to answer for all those accidents to which the life of man is exposed, unless the *cestui que vie* puts himself to death, or he die by the hand of justice. The policy, as to the risk, generally runs in these words: " The said insurers, in consideration of the sum paid, do assure, assume, and promise that the said *A. B.* shall, by the permission of Almighty God, live and continue in this natural life for and during the said term, or in case he the said *A. B.* shall, during the said time, or before the full end and expiration thereof, happen to die by any ways or means whatsoever, suicide or the hands of justice excepted then, &c." We see that this contract expressly says, that the death must happen within the time limited, otherwise the insurers are discharged. But suppose a mortal wound is received during the existence of the policy, and the person languishes till after the term limited in the contract, what says the law ? Agree-

[s] Park. c. xxii.

ably to the decision of this point, in cases of marine insurances, not only the cause of the loss but the loss itself must actually happen, during the time named in the policy, otherwise the insurers are not responsible. This very case was put by Mr. Justice Willes, in his argument, when delivering the opinion of the Court, in the case of *Lockyer v. Offley*. Suppose, said the Learned Judge, an insurance upon a man's life for a year, and some short time before the expiration of the term he receive a mortal wound of which he dies after the year, the insurer would not be liable. But when an insurance is made upon a man's life who goes to sea,^(t) and the ship in which he sailed was never afterwards heard of, the question whether he did or did not die within the time insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence.

Thus in an action^(u) on a policy of insurance on the life of L. Maclean, Esq. from the 30th January 1772, to the 30th January 1778, it appeared in evidence, that about the 28th of November 1777, Maclean sailed from the Cape of Good Hope in the *Swallow* sloop of war, which ship not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was, whether Maclean died before the 30th January

[t] Park c. xxii.

[u] *Patterson v. Black*, *Sittings at Guildhall, Hil. Vac. 1780*.

1778. In order to establish the affirmative of that question the plaintiff called witnesses to prove the ship's departure from the Cape with Macleane, and several Captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of January, the period of a most violent storm, in which she probably was lost. That the *Swallow* was much smaller than their vessels, which with difficulty weathered the storm.

Lord Mansfield left it to the jury, whether under all the circumstances, they thought the evidence sufficient to convince them that Macleane died before the time limited in the policy, adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff.

These insurances, (x) when a loss happens upon them, must be paid according to the tenor of the agreement in the *full sum* insured, as this sort of policy, from the nature of it, being on the life or death of man, does not admit of the distinction between total and partial losses.

We have seen that private persons as well as the public companies, may be underwriters upon policies on lives; and as they frequently became bankrupts

after the policy was underwritten, but before a loss happened, it became a question whether the persons interested in such insurances could claim the money and prove the debt, under the commission, as if the loss had happened before it issued. In order to remedy an inconvenience of this nature, with respect to marine insurances and bottomry bonds, a statute had passed, (y) allowing creditors, either on such policies or bottomry and respondentia bonds, to prove their debts under the commission as if the loss or contingency had happened prior to that event. But as the words of the preamble to that section of the statute were special, referring only to insurances on ships and goods or contracts of bottomry, it was doubtful whether it extended to insurances on lives, although the words of the enacting part, were very general, namely, "the assured in *any policy of assurance*," &c. In support of this doubt it was urged, that great inconveniences would follow from extending the statute to these policies, because the risk may remain unsettled for a long and indefinite number of years. The Court however held, that the general words of the enacting part, were not restrained by the preamble.

This doctrine was laid down in an action (z) on a policy of insurance on the life of J. H. Boyd, lately gone to the East Indies, on the event of his

[y] 19 Geo. 2. c. 37. s. 2.

[z] Cox v. Lictard, Dougl. Rep. p. 166. note.

dying between the 5th of April 1780 and the 5th of April 1783. The defendant pleaded; 1st, Bankruptcy generally; and that the cause of action accrued before the bankruptcy: 2dly, That *the policy was made prior to the time of his becoming a bankrupt*, then the trading, petitioning creditor's debt, commission, proceedings and certificate were specially set out, and that he was thereby discharged from the said policy, and all debts due at the time of the bankruptcy, without saying, that the cause of action accrued before the bankruptcy. To this last plea there was a general demurrer.

Lord Mansfield observed, that the only question was, whether the *enacting words* of this statute, which are *general*, should be restrained by the *preamble* which is *particular*. His Lordship thought they should not be restrained. The enacting clause comprehends *all* insurances, and consequently insurances *upon lives*. This is exactly the case of *Pattison v. Banks*,^(a) for there the preamble was *particular*, but the enacting clause was *general*.

[a] The question of *Pattison* (Cowp. Rep. 540.) arose upon the 7 Geo. 1. c. 31. which allowed persons, who had given credit on bills, bonds, notes, and other securities, payable at a future day, and which were not payable at the bankruptcy of the debtor, to prove them under the commission. The preamble to the statute speaks of securities only for the sale of goods and merchandizes; but as the enacting words were general, the Court held that they extended to the bond for the payment of an annuity for a term of years.

Mr. Justice Willes and Mr. Justice Ashhurst concurred. Mr. J. Buller—"In the Case of *Mace v. Cadell*, it was held that the enacting words of the stat. 21 Jac. I. c. 10. were not restrained by the preamble. (b) The inconveniences that have been urged, are not so great as are apprehended; for the creditors need not be delayed in their dividend; when a creditor has an insurance of this kind, he has nothing to do but to lay it before the commissioners, who will make a calculation, and lay aside as much as will give him a dividend equal to that of the other creditors. There must be judgment for the defendant."

It became a doubt in the reign of King William, when a policy on a life was to run from the day of the date therefore, till that day twelvemonth; and the person died on the day named, whether the insurer was liable. The Court held that he was. The case was this: (c) A policy of insurance was made to insure the life of Sir Robert Howard, for one year from

(b) The statute of James enacts, "that if any person at such time as he shall become bankrupt shall, by the *consent of the true owner*, &c. have in his possession, &c. any goods, &c. whereof he shall be reputed owner; the commissioners shall have power to sell the same in like manner as any other part of the bankrupt's estate." The Court, in *Mace v. Cadell* (Cowp. 232.) held that the statute extended to the goods of a *third person* which he allowed the bankrupt to keep in possession of, as well as to those which *originally* belonged to the bankrupt; although the statute speaks only of the bankrupt's original property:

[c] Sir Robert Howard's case, 2 Salkeld 625. 1 Ld. Raymond, S. C.

the day of the date thereof; the policy was dated on the 3d day of September 1697. Sir Robert died on the 3d of September 1698, about one o' clock in the morning. Lord Holt held that from the day of the date excludes the day, but from the date includes it; (d) so that the day of the date must be excluded here, and the underwriter is liable.

In the law books this distinction taken by my Lord Holt was at one time held to be law, at others not; sometimes these expressions were held to mean the same thing; at others to be quite different. In the year 1777, however, this glaring absurdity was entirely done away, and the Court of King's Bench unanimously held, after much deliberation, that they mean the same thing; that they shall be either exclusive or inclusive, according to the context and subject matter, and shall be so construed as most effectually to support the deeds of the parties and not to destroy them. See Lord Mansfield's very elaborate argument upon this occasion, in which all the cases are fully stated and considered. (e)

Although from a perusal of the above, it will appear that no difficulty could occur on such a point at the present day: yet it is usual in order to prevent disputes to insert in the modern policies "*the first and last days included.*"

[d] Vide Pugh v. the Duke of Leeds, Cowper's Rep. 714.

[e] Ibid.

Policies on lives are equally vitiated by fraud or falsehood, as those on marine insurances; because they are equally contracts of good faith, in which the underwriter from necessity must rely upon the integrity of the insured for the statement of circumstances.

In an action on a policy of insurance for 150*l.* (*f*) at four guineas *per cent.* in case Drury Sheppy should die at any time between the 1st of April 1777 and the 1st of April 1778, both days included, and during the life time of John Sheppy, the father of Drury : but in case the said John should die before the said Drury, the policy to be void ; the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was 900*l.* due from Drury Sheppy to the plaintiff. It was admitted that the life expired within the time limited in the policy. Drury Sheppy had a place in the Custom House of Ireland, and was in bad circumstances. He went to the South of France for the benefit of his health, or to avoid his creditors, and there died. The broker who effected the policy told the underwriters that the gentleman for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life.*

Lord Mansfield—“ As to the interest, this policy may be considered as a collateral security for the

[*f*] Stackpole v. Simon. Sitt. at Guildhall. Hil. Vac. 1779.

debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first: and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from *information*." There is no fraud in him. There was a verdict for the plaintiff.

Even where there is an express warranty, that the person is in good health, it is sufficient that he is in a reasonable good state of health; for it never can mean that the *cestui que vie* is perfectly free from the seeds of disorder. Nay, even if the person, whose life was insured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with; and the insurer is liable.

So in the case of *Ross v. Bradshaw*, (1 Blac. Rep. 312.) Lord Mansfield held that the warranty was complied with, *although the life insured had been subject to a particular infirmity*. The only question being whether Sir James Ross, the person whose life had been insured, *was in a reasonable good state of health, and such a life as ought to have been insured on common terms*.

VI. OF INSURANCE AGAINST FIRE.

AN insurance of this sort is a contract; (a) by which the insurer in consideration of the premium which he receives, undertakes to indemnify the insured against all losses which he may sustain in his house or goods by means of fire, within the time limited in the policy. To enter upon a detail of the various advantages which mankind have derived from this species of contract is unnecessary, as they are obvious to every understanding. Some of the societies for the purpose of insuring property against fire, have been instituted by Royal Charter; others by deed inrolled; and others give security upon land for the payment of losses. The rules by which these societies are governed are established by their own managers, and a copy given to every person at the time he insures; so that by his acquiescence he submits to their proposals, and is fully apprized of those rules upon the compliance or noncompliance with which he will or will not be entitled to an indemnity.

The construction to be put upon those regulations has but seldom become the subject of judicial inquiry; two instances only having occurred in our researches upon this occasion. (b) In the proposals

[a] Park c. xxiii.

[b] Ibid.

of the London Assurance and some of the other offices, there is a clause by which it is provided, that they do not hold themselves liable for any loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever. It became a question, what species of insurrection should be deemed a military or usurped power within the meaning of this proviso. It was held by the Court of Common Pleas, against the opinion of Mr. Justice Gould, that it could only mean to extend to houses set on fire by means of an invasion from abroad, or of an internal rebellion, when armies are employed to suppress it.

The case in which this question arose, (c) was an action of covenant against the Defendants upon a policy of insurance of a malting office of the plaintiffs at Norwich from fire, in which policy there was a proviso that the corporation should not be liable in case the same should be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever; (d) and that the defendants had not kept their covenants to the plaintiffs' damage. The defendants plead first the general issue, that they have not broken their covenants, and thereupon issue is joined. 2dly, They plead that it was burnt by an usurped power: the plaintiff replied that it was not burnt by an usurped power, and thereupon issue is also

[c] Drinkwater v. the Corporation of the London Assurance, 2 Wils. 363. [d] Park c. xxiii.

joined. This cause was tried at Norwich Assizes; a verdict was given for plaintiff, and 469*l.* damages, subject to the opinion of the Court upon the following case, viz. that upon Saturday the 27th of November, a mob arose at Norwich upon account of the high price of provisions, and spoiled and destroyed divers quantities of flour; thereupon the proclamation was read, and the mob dispersed for that time. Afterwards another mob arose and burnt down the malting office in the policy mentioned. The question was, whether the plaintiff was entitled to recover in this action? This case was twice argued at the bar, and the Court took time to deliberate, after which, as the judges differed in opinion, they delivered their opinions seriatim, when three judges against one were of opinion there must be judgment for the plaintiff; and accordingly the *postea* was delivered to him.

An action was brought on a policy of insurance to recover from the Sun Fire Office a satisfaction for damage done to the plaintiff's house and goods by the rioters, in June 1780.^(c) As the circumstances of these riots were very recent they were not very minutely gone into at the trial. It was, however, sufficiently proved that the plaintiff, on account of his religion, (being a Roman Catholic) had been amongst others, selected as an object of the rage of the times,

[c] *Langdale v. Mason and others*, Sitt. at Guildhall, Mich. Vac. 1780.

and that this house and effects were set on fire. The office defended this action, considering that they were protected by this article, namely—"That they " would not answer for any loss occasioned by any " invasion, foreign enemy, *civil commotion*, or any " military or usurped power whatever." This point was argued much at length by the counsel on both sides. (f) It was held, however, that this was a case coming under the description of a *civil commotion*, and a verdict was accordingly found for defendants.

In a policy of insurance against loss by fire from half a year to half a year, (g) the insured agreed to pay the premium half yearly "as long as the assurers should " agree to accept the same *within fifteen days after " the expiration of the former half year*;" and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid; and it was held that the assurers were not liable, though the assured tendered the premium before the end of fifteen days, but after the loss.

The defendants in the above cause were members of a society at Liverpool for the insurance of property from fire: but soon after the decision the Royal

[f] Park c. xxiii.

[g] Tarleton and others v. Staniforth, 5 Term Rep. 695. This judgment was afterwards affirmed in the Exchequer Chamber, 1 Bos. & Pull. 471.

Exchange Assurance Company, the Phoenix, and some other Insurance Companies, gave notice that they did not mean to take advantage of the judgment so pronounced but would hold themselves liable for any loss during the fifteen days that were allowed for the payment of the insurance upon annual policies, and all other policies of a longer period. But that policies for a shorter period than a year would cease at six o'clock in the evening of the day mentioned in the policy.

When a fire happens, (h) and the party sustains a loss in consequence of it, he is bound by the printed proposals of most of the societies, to give immediate notice thereof to the office in which he is insured; and as soon as possible afterwards, or within a limited time according to the regulations of some, to deliver in a particular account of his loss or damage, as the nature of the case will admit; and make proof of the same by his oath or affirmation, by books of account, or such other vouchers as shall be required, or as shall be in existence. It is also necessary that the insured should procure a certificate under the hands of the ministers and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such a loss, importing that they are well acquainted with the character and circumstances of the sufferer or sufferers; and do know, or verily believe, that he, she, or they have

really, and by misfortune sustained by such fire the loss and damage therein mentioned. It has however been held by the Court of King's Bench,⁽ⁱ⁾ upon a writ of error from the Court of Common Pleas, that the printed proposals,^(k) containing the above clause, are to be considered as part of the policy; and that the procuring such a certificate is a condition *precedent* to the right of the assured to recover, and cannot be dispensed with, even though the minister and churchwardens wrongfully refuse to grant the certificate.

When any loss is settled and adjusted, the sufferers are to receive immediate satisfaction, without any deduction.

In the *Lex Mercatoria* it is said, that policies on houses and lives admit of no *average*. That this is true of the latter cannot be denied, because the payment of the whole sum depends upon one single event, which must *wholly* happen, or not at all. But that it cannot be true of insurances against fire either of houses or goods is equally clear: for houses may be *partially* damaged and goods may be *partially* destroyed. In which case as insurance is:

[i] *Worsley v. Wood*, 6 Term Rep. 701; 2 H. Black. Rep. 574. S. C. See also *Routledge v. Burrell*, 1 H. Black. 254. and *Oldman v. Bewick*, 2 H. Black. 577. n.(a)

[k] In the Common Pleas a compliance with the printed proposals *Cy pres* was held to be sufficient.

a contract of indemnity, the end of the contract is answered by putting the party in the same situation in which he was before the accident happened. But if he were to recover the whole sum insured, he would be in a better situation, which the law will not allow. Indeed, from the above quotation from the printed proposals, it is evident that the offices consider themselves liable for partial losses. Nay, some of them, if not all, expressly undertake to allow all reasonable charges attending the removal of goods, in case of fire, and to pay the sufferer's loss, whether the goods are destroyed, lost, or damaged by such removal. (l)

These policies of insurance are not in their nature assignable, for they are only contracts to make good the loss, which the contracting party himself shall sustain; nor can the interest in them be transferred from one person to another without the consent of the office. But in marine insurances the policy may be transferred. (m)

There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator, respectively, or to whom the property insured shall belong; (n) provided, before any new payment

[l] Royal Exchange Assurance Company, Sun Fire Office, Phoenix Fire Office, &c.

[m] *Delaney v. Stoddart*, 1 T. Rep. 26. [n] *Park c. xxiii.*

be made, such heir, executor, or administrator, do procure his or her right to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases, there can be no assignment : and the party claiming an indemnity must have an interest in the thing insured at the time of the loss. These points were decided in two causes, one before Lord Chancellor King, and the other before Lord Hardwicke.

On the 28th of July 1721,(o) one Richard Ireland took out from the Sun Fire Office a policy of insurance, whereby it was witnessed, that whereas the said Ireland had agreed to pay or cause to be paid to the said office the sum of 5*s.* within 15 days after every quarter-day for the insurance of his house, being the Angel Inn at Gravesend, with his goods and merchandize as thereafter expressed only, and not elsewhere, viz. the dwelling-house not exceeding 400*l.* ; and for the goods in the same only, not exceeding 500*l.* ; and for the stable only, not exceeding 100*l.* ; all then occupied by James Peck from loss or damage by fire ; and so long as the said Richard Ireland should duly pay or cause to be paid 5*s.* a quarter as therein mentioned, the said society did bind themselves, their heirs, executors, administrators and assigns, to pay and satisfy the

[o] Lynch and another v. Dalzell and others, 3 Brown's Parl. Cases, 497.

said Ireland, his executors, &c. within 15 days after every quarter-day in which he should suffer by fire, his loss not exceeding 1,000*l*, according to the exact tenor of their printed proposals. The policy was subscribed the 28th July 1721, by three of the trustees of the society. Some considerable time afterwards, Richard Ireland died, having made his will, and Anthony his son sole executor; who brought the policy to the office, and had an indorsement made thereon, that the same then belonged to him; and afterwards, namely at or about Christmas 1726, he, the said Anthony paid the said office a premium of 20*s*. for one year's insurance from Christmas 1726 to Christmas 1727, as by an article in the proposals he was at liberty to do. On the 24th of August 1727, a fire happened at Gravesend, which among others destroyed the house mentioned in the policy; and some time afterwards the appellants applied to the office, and alleged that they had purchased the house and goods of the the said Anthony Ireland; that the same were their property at the time of the fire, and that they had an assignment of the policy made to them at the same time that the house and goods were assigned; and they produced an affidavit made by the appellant Roger Lynch, in which he swore that his loss and damage by the burning of the said house amounted at a moderate computation to 500*l*. and upwards; and upon this affidavit was indorsed a certificate of the minister, churchwardens, and other inhabitants of Gravesend:

that they verily believed, according to the best of their information, the appellants had sustained a loss of 500*l.* and upwards. But neither in the affidavit, or certificate, was any mention made of any loss being sustained by the appellants by the burning of any goods in the said house ; nor was any affidavit made by Anthony Ireland, in whom the property of the policy was, that he had suffered any loss. The appellants, however, insisted, that the office should pay them 1,000*l.* for their loss sustained by the burning of the house and goods ; and they accordingly filed a bill in Chancery, setting forth that Anthony Ireland agreed to sell and assign to the appellants the house, stables and goods, and also at the same time agreed to assign the policy ; and that by indenture of the 24th June 1727, for 250*l.* Ireland did assign to the appellants a lease he had of the house and stables, for the residue of a term of 70 years, which commenced at midsummer, 16 Car. 2. ; but the goods for which the appellants, as they alleged, were to pay 500*l.* being intended for one Thomas Church, who was to hold the inn under the appellants, Ireland, by deed poll of the same date, sold the same to Church for his own use. The bill also stated, that by another writing of equal date, Ireland assigned the policy, and all money and benefit thereof to the appellants. That although the bill of sale of the household goods was made to Church, yet as the appellants paid the purchase money for the same, Church assigned his bill of

sale to them for securing the money they had paid for the goods ; and afterwards, by another writing, released to the appellants, his benefit and interest in the policy. The bill prayed satisfaction. The respondents put in their answer, in which they set forth the nature and method of the insurances made by the office, and admitted the policy in question, and the appellants' application for 1,000*l.* loss ; but said that the affidavit produced was not agreeable to the proposals : and that they had been informed and believed, that no assignment of the policy was made to the appellants, nor any assignment of goods made to them by Church, till after the fire. They insisted that the policies issued by the office were not in their nature assignable, the same being only contracts to make good the loss which the contracting party himself should sustain ; and the policy in question was first made to Richard Ireland, to pay his loss, and was afterwards declared by indorsement to belong to Anthony Ireland ; and that no other person was entitled to the benefit of it. The cause proceeded to issue, and witnesses were examined on both sides ; and upon the appellants' own evidence it appeared that the first discourse between the appellants and Mr. Ireland about the policy, was after the execution of the assignment of the house, and that the agreement (if there was any) about the policy was not at the time when the appellants agreed to Ireland's term in the house. It appeared that the assignment of the policy, though

bearing date *before* was not made and executed till some time *after* the fire ; so that the agreement for assigning the policy was a voluntary concession of Ireland without any consideration, and independent of the bargain for the house, and never made till after Ireland's interest in the policy, as to the house, was determined by his selling his interest in the thing insured, and not carried into execution till the thing was lost. As to the appellants' property in the goods, they proved an assignment from Church to them as a security for 300*l.* but omitted in their interrogatories the material question, *when this assignment was made* : though the respondents, by their answer put the time plainly in issue by insisting, that it was after the fire ; and it did not appear that the appellants ever had any property in the goods. The respondents, on their part, proved that the office did not insure any persons longer than they continued their property, in the thing insured ; and that persons dealing with them might not be mistaken, such notice was usually given.

Lord Chancellor King observed that the appellants' claim was at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened. His Lordship therefore dismissed the bill.

Upon this decree there was an appeal to the House of Lords ; and after hearing counsel on both sides, it was ordered and adjudged that the same should be dismissed, and the decree therein complained of affirmed.

A few years afterwards this case was cited with approbation by Lord Hardwicke, and relied upon by him as the ground of his opinion.

Ann Strode, having six and a half years to come in a lease of a house from the plaintiff,^(o) on the 27th of April 1734, became a proprietor of the Hand in Hand Office by insuring the sum of 400*l.* on the house for seven years ; and on paying 12*s.* down, and 3*l.* some time after, the Company agreed to “ raise and pay, out of the effects of the contribution stock the said sum of 400*l.* to her and her executors, administrators and assigns, so often as the house shall be burnt down within the said term, unless the directors should build the said house, and put it in as good plight as before the fire, and on the back of the policy it was indorsed, that if this policy should be assigned the assignment must be entered within 21 days after the making thereof.” Mrs. Strode’s lease expired at midsummer 1740, and she made an assignment of the policy to the plaintiff the 23d of February after, 1740. The question was whether the plaintiffs, the assignees

[o] The Sadler Company v. Badcock and others, 2*Atk.* 534.

of Mrs. Strode, were entitled to the 400*l.* : or to have the house built again ; or whether, the house being burnt down after Mrs. Strode's property ceased in it, the Company were obliged to make good the loss to her assignee of the policy ? The Company made an order subsequent in time to Mrs. Strode's policy in 1738, " That whereas policies expire upon the property of the insured ceasing, if there is no application of the insured to assign, or to have the loss made up, then the person having the property may insure the said house in the said office, notwithstanding the term for which the house was originally insured expired." There was evidence read for the plaintiffs to shew that they tendered the assignment to the defendants to enter in their books, but they refused to accept it.

Lord Chancellor Hardwicke was of opinion that the plaintiffs were not entitled to be relieved, and the bill was dismissed accordingly.

In the body of the policy the Company acknowledge the receipt of the premium at the time of making the insurance ; and by the printed proposals of the different societies, it is expressly stipulated that no insurance shall take place till the premium be actually paid by the insured, his, her, or their agent or agents. This premium or consideration-money is in all the offices at the rate of 2*s.* *per cent.* for any sum not exceeding 1,000*l.* and 2*s.* 6*d.* from 1,000*l.*

and upwards. But this must be understood to mean the premium upon *common insurance* only; for upon hazardous trades, and wooden buildings, &c. the premium is proportioned to the risk. Besides this, by 22 Geo. 3. c. 48. s. 1 and 2. a duty of 1s. 6d. *per ann.* is laid upon every 100% of property insured from fire. By 37 Geo. 3. c. 90. s. 19. an additional duty of 6d. for every sum of 100% insured is imposed, making in the whole 2s. *per cent.* The duty imposed by the first act is not to extend to public hospitals.

By section 24. of the latter act it is provided that for every policy of assurance from loss by fire, where the sum insured shall not amount to 1,000% the sum of 3s. ; and where the sum insured shall amount to 1,000% or upwards, the sum of 6s. shall be paid.

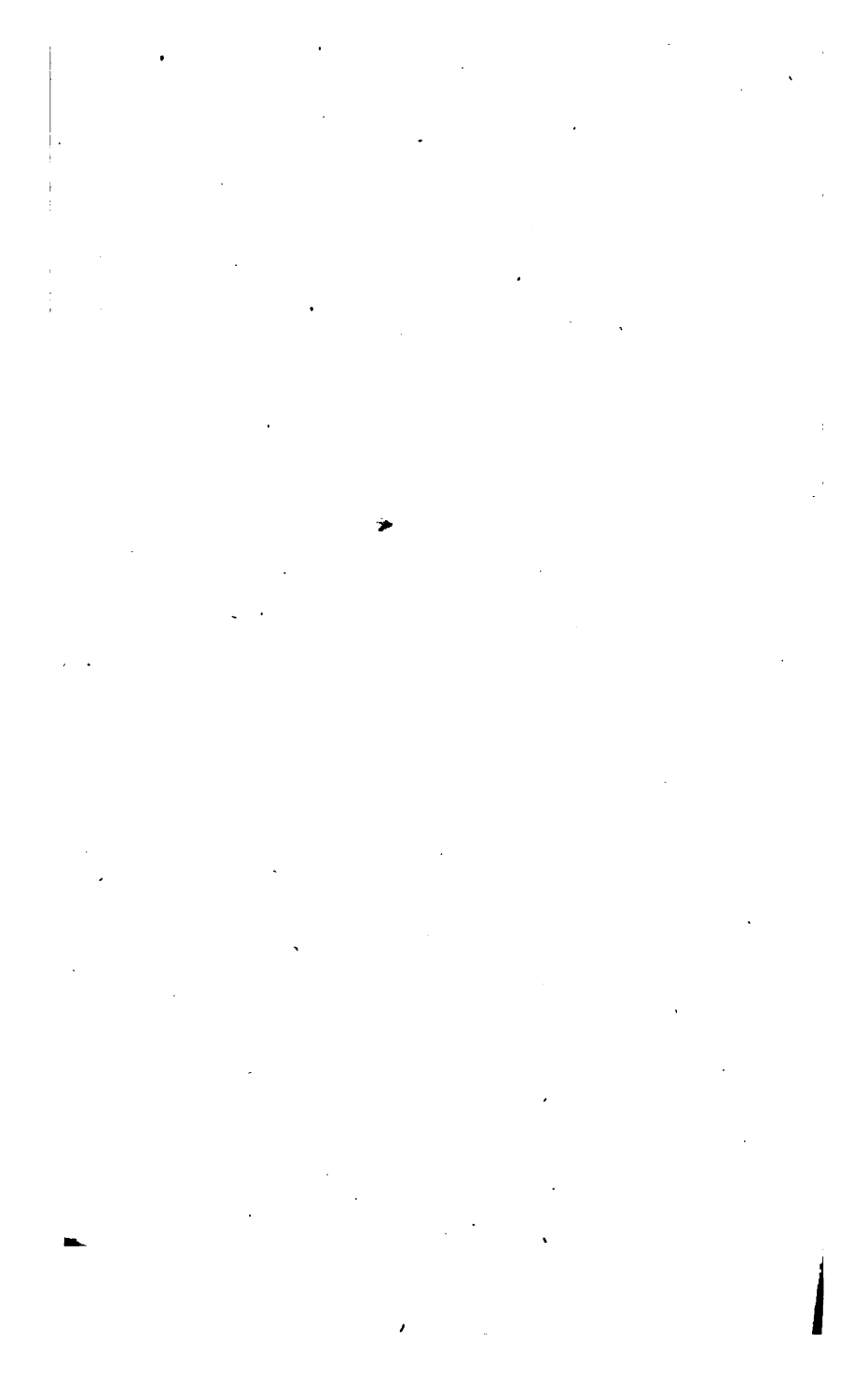
By a policy under a seal, referring to certain printed proposals, a fire office insured the defendants' premises from 11th of November 1802 to 25th December 1803, (*p*) for a certain premium, which was to be paid yearly on each 25th of December, and the insurance was to continue *so long as the insured should pay the said premium of the said times, and the office should agree to accept it.* And by the printed proposals it was stipulated that the insured should make all future payments annually at the office *within*

fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium were paid. And by a subsequent advertisement (agreed to be taken as part of the policy) the office engaged that all persons insured there *by policies for a year or more, had been, and should be, considered as insured for fifteen days beyond the time of the expiration of the policies ;* yet held notwithstanding this latter clause, the assured having before the expiration of the year had notice from the office to pay an increased premium for the year ensuing, otherwise *they would not continue the insurance, which the assured had refused ;* that the office was not liable for a loss which happened *within fifteen days from the expiration of the year* for which the insurance was made ; though the assured after the loss, and *before the fifteen days expired,* tendered the full premium which had been demanded. The effect of the whole contract, &c. taken together, being only to give the assured an option to continue the assurance or not, during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, *before the end of the year,* determined the option by giving notice that they would not renew the contract.

As the purest equity and good faith are essentially requisite to render the contract effectual when it relates to marine insurances, so it need hardly be obser-

ved that it is no less essential to the validity of policies against fire, because in the latter, as well as in the former, the insurer, from the nature of the thing, is obliged, in a great measure, to rely upon the integrity and honesty of the insured, as to the representation of the value and quantity of the property which is the object of the insurance.





I N D E X.

ABANDONMENT.	Page
Insured must <i>abandon</i> before he can recover,	113
Proceedings to be adopted,	114
<i>Abandonment</i> must be <i>total</i> not <i>partial</i> ,	id.
Upon an embargo in a foreign port, the owner, who had separately insured <i>ship</i> and <i>freight</i> <i>abandoned</i> them; after which the embargo was taken off, and the ship completed her voyage and earned her freight: held, assured could not recover as for a total loss of freight, the freight having been in fact earned,	116
Insured cannot take chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards <i>abandon</i> , when they find they cannot turn it to their advantage,	119
ACTION,	
not maintainable for premiums on <i>Re-assurance</i> ,	19
will lie <i>for not insuring</i> , triable on the same principles as action on policy,	21
against insurance companies must be <i>debt</i> or <i>covenant</i> ,	49
against a private underwriter, <i>indebitatus assumpsit</i> , and may be brought in broker's name,	id.
In what case <i>action</i> for money had and received lies,	51
Action upon promises will lie to recover general average loss, incurred by sacrificing ship's tackle, &c. for benefit of whole concern,	100

ADJUSTMENT.

what is so called,	107
Consequence of underwriter refusing to pay after adjustment,	id.

See also Tit. Loss

ALIEN ENEMY.

Trading under licence with an <i>alien enemy</i> for specie and goods brought in his ships, incidentally legalizes insurance on <i>enemy's ships</i> as well as goods of British subject,	35
---	----

AVERAGE, General.

Principle derived from ancient law of Rhodes	92.
Adopted by all commercial nations, with many variations in practice,	id.
Determination of English Courts furnish little authority,	93
Rule of Rhodian law,	id.
Goods must be <i>thrown</i> overboard ; the mind and agency of man must be employed to recover for general average,	id.
If <i>forced out by waves</i> , merchant cannot recover for <i>general average</i> ,	id.
Cases which entitle assured to recover for <i>general average</i> ,	94
Definition and acceptance of the word <i>average</i> ,	95
Where owners are liable to contribute,	id.
Where they are not,	id.
Diamonds and jewels must contribute,	id.
Ship's provisions, wearing apparel, &c. bottomry and respondentia bonds, sailors' wages, &c. shall not,	id.
Where ship is obliged to go into port for benefit of the whole concern, expense of repairs, &c. are <i>general average</i> ,	96.
Goods stowed upon deck are excluded from <i>general average</i>	id.
Principle on which <i>general average</i> is to be calculated,	id.
Example and result from such principle,	98.
Customary for broker to draw up adjustment of <i>average</i> ,	100.

AVERAGE—*continued.*

What sort of estimate must be made in settling
gross average, 100

Charge of reclaiming ship, wages, and expenses
of ship's company, may be brought into a *general average*, 101

When contribution of *general average* is made id.

Small or Petty :

Definition of id.

Does not fall to the underwriter, id.

AVERMENT.

Where *averment* is good, 53.

Declaration on policy on a *foreign* ship, need
not *aver* any interest in assured, 52

Averment of interest relates to time of making pol-
icy, id.

(See also Tit. PROCEEDINGS.)

BARRATRY,

Derivation and definition of, 82

It is barratry in the master to smuggle, 83

Freighter considered owner *pro hac vice*, and if
master commit criminal act without *his* privity
though with knowledge of original owner, it is
barratry, id.

Act of Captain, *with knowledge of owner of the
ship*, without privity of owner of goods, is not
barratry, id.

If master of ship be also owner, he cannot be guilty
of *barratry*, id.

In an action for loss by *barratry*, proof that per-
son described as master, without shewing neg-
atively that *he* was not the owner, or affirma-
tively that another person was, held sufficient
to entitle plaintiff to recover, 84

Not necessary if loss should happen *in the very
act of barratry*, id.

The moment ship is carried from its proper track
with evil intent, it is *barratry*, id.

Assurer undertakes against *barratry* of master,
&c. though appointed by *insured*, which is pec-
uliar to law of England, id.

BARRATRY—*continued.*

- If ship take a prize, and is obliged to return to port therewith, against orders of owners, it is not *barratry*, 84
- Punishment of *barratry* in foreign countries, and statutes for prevention thereof in this, 85.
- Where *master* had general instructions to make purchases with dispatch, he was not warranted in going to an enemy's settlement—deemed *barratry*, 87
- Barratry* in *master*, not paying port duties, whereby goods are forfeited, *id.*
- If Captain, contrary to the instruction of his owners, cruize for and take a prize, and his vessel is afterwards lost, it is *barratry*, 88
- Deviation of the captain through ignorance, *barratry*, *id.*

BILL OF LADING,

- held to be compleat acknowledgment of captain of receipt of goods, 58.
- assignable in its nature, *id.*
- Where there are several *bills of lading*, of same date, but different imports, no reference to be had to time when first signed by captain, *id.*

BOTTOMRY.

- Bottomry* and *respondentia* do not contribute to general average, 95.
- All sums lent on *bottomry* and *respondentia* shall be lent only on ship and merchandize, and so expressed in bond 19 Geo. 2. c. 37. s. 5. 147
- and must be mentioned and specified in policy, 148
- Definition of *bottomry*, 173
- Distinction between *bottomry* and *respondentia*, *id.*
- Various application of term *bottomry*, 174
- Legislative regulations contained in 19 Geo. 2. c. 37. *id.*
- Above Act does not mean to prevent King's subjects from lending money on *bottomry* on foreign ships trading from their own country to their settlements in the East Indies, *id.*
- Loan upon voyage without a security on the ship or goods is entirely prohibited by the laws of France, 177

BOTTOMRY—*continued.*

Origin of <i>bottomry</i> and <i>respondentia</i> ,	178
Master may hypothecate either ship or goods,	id.
Ship must be <i>abroad</i> , as well as in a state of necessity, to justify captain in taking money on <i>bottomry</i> ,	180
Lender on <i>bottomry</i> , or at <i>respondentia</i> , runs nearly the same risk as insurer,	181
Ancients well acquainted with <i>bottomry</i> and <i>respondentia</i> ,	id.
If ship arrive safe, lender on <i>bottomry</i> shall be paid his principal, however much it exceeds the legal rate,	183
Usury cannot be pleaded to actions for obligations on <i>bottomry</i> , &c. as on account of the risk the interest shall be larger than the common rate,	185-6
But a court of equity will not assist a <i>bottomry</i> bond which carries unreasonable interest,	187
If a contract were made by colour of <i>bottomry</i> in order to evade the statute, it would be usurious and void,	id.
Where ship does not perform voyage, and lender incurs no hazard, he should lose the premium, and be content with principal and ordinary interest,	188
Commencement of contingency in <i>bottomry</i> bond,	id.
Amount of loan on <i>bottomry</i> or <i>respondentia</i> not restrained by any regulation,	189
Lender is likewise answerable for losses by capture,	190
But if a ship be taken and detained for a short time, and yet arrive at destined port within time limited, bond is not forfeited,	id.
Lender on <i>bottomry</i> or at <i>respondentia</i> not entitled to benefit of salvage, nor liable to contribute in case of general average,	id.
In an action on a <i>respondentia</i> bond, the ship being <i>Danish</i> , and an average loss sustained, held that plaintiff was entitled to recover, as by the law of <i>Denmark</i> lenders upon <i>respondentia</i> , &c. are liable to average, and bound to contribute,	191
Where ship deviates from voyage described, lender not bound to bear the loss,	192-3

BOTTOMRY—*continued.*

Obligee in any *bottomry* or *respondentia* bond may be admitted to claim under a commission of bankruptcy, and receive a dividend, 194

BROKER

has a *lien* on policies; and though he part with possession of policy, yet if it returns into his hands *lien* revives, 54-5

may open policy in his own name, declaring for whose use, &c. id.

if limited to too small a premium, (whereby insurance cannot be effected) *merchant* becomes liable to make good the loss to his correspondent, 22

In what case broker has not a *lien*, 819

Customary for broker to draw up adjustment of average, 100

CAPTURE,

Definition of, 71

No *capture* can be so total a loss, as to leave no possibility of recovery, 72

Effect, *re-capture* had, upon contracts of insurance, before 19 Geo. 2. c. 37. id.

On payment of salvage in case of *re-capture*, right of original owner preserved to him for ever, 73

A capture having been illegal, but charges, &c. being great, insured made compromise on liberation of ship. Underwriter held answerable for charges of such compromise, id.

Rule not settled among nations, as to precise period when property is diverted by *capture*, 74

Marine law of England as to *capture*, 75

States in alliance with the *captors*, and at war with the country to which *captured* ship belongs, form one community with *captors*, id.

and prize carried into such a state may be legally condemned, 75-6

Unlawful for British subject to ransom ship *captured* by enemy. Penalty 500*l.* id.

Sum paid on account of ransom, not recoverable from underwriters, 77

CHANGING SHIP,

Proceedings in regard to, 132

CHANGING SHIP—*continued.*

- Insured have no right to change ship, as one may be less able to resist perils of the sea, or sail faster so as to escape an enemy, than another, and consequently alters the risk, 133
 But if *necessity* require, ship may be changed, 134

CONCEALMENT,

- Vitiates all contracts of insurance, 122-7-8
 Policy is void if broker *conceal* any material circumstances, though the only ground for not mentioning them should be, that the facts *concealed* appeared immaterial, 125-7
 What is *not* deemed fraudulent *concealment*, 130-1

CONDEMNATION,

- Condemnation* on ground of infraction of treaty, in not being properly documented, &c. conclusive against warranty of neutrality, 44
Condemnation on goods warranted *American*, though in ship hired and loaded at London, and destined for the English Islands, not conclusive evidence against warranty of neutrality, 45
Condemnation of ship warranted *American*, for want of *rol'd equipage* or list of crew, conclusive against warranty of neutrality, though really *American*, *id.*
 Practice of courts relative to sentences of foreign courts of admiralty, 60-61-62
 Sentence of foreign courts conclusive on a policy, upon every matter *within jurisdiction* of such court, 46

CONSIGNEE

- may insure commissions, 152

CONVOY.

- Unforeseen separation from *convoy* renders underwriter liable, 41
 Where ship is prevented from joining *convoy* by tempestuous weather, yet endeavours to do so, deemed a satisfaction of warranty to sail with *convoy*, *id.*
 Penalty on captain of merchant ship, under *convoy*, disobeying signals or instructions, 500l.

CONVOY—*continued.*Acts relating to *convoy*;

13 Car. 2. st. 1. c. 9. art. 17.

22 Geo. 2. c. 33. sec. 2. art. 17.

38 Geo. 3. c. 76.

39 Geo. 3. c. 32.

43 Geo. 3. c. 57. sec. 1.

41

DECLARATION. See Tit. PROCEEDINGS.

DETENTION.

What is deemed a *detention*,

79

On *detention* by foreign power, to search for enemy's property, costs and charges, &c. must be borne by underwriter,

id.

but not on *detention* for non-payment of customs, or navigating against laws of those countries,

id.

Uncertain whether *detention* by power of country to which ship belongs is within the policy,

id.

In case of loss by *detention*, assured must abandon as *detention* includes and entitles assured to abandon, and recover for a total loss,

80

DEVIATION.

What is so understood,

134

Whenever *deviation* is occasioned by absolute necessity, the underwriter continues liable,

135

It is no *deviation* when ship is obliged by storm, &c. to make the nearest port to refit.

136

so if to escape a storm she goes out of her course, or is driven thereout by stress of weather,

id.

Deviation may be justified if done to avoid an enemy, or seek convoy,

id.

In case of *deviation* from necessity, ship must pursue such *voyage of necessity* in the direct course, and in shortest time possible,

136-7

deviation merely intended, but never effected, does not discharge insurers,

id.

Wilful *deviation* from the due course of voyage insured, is a determination of policy,

138

If voyage described in policy be from A. to B. and C. and the ship go to C. before B. (though C. be nearer to A. than B.) it is a *deviation* if it

DEVIATION—*continued.*

- be not the regular course of the voyage to C.
first, id.
Deviation from voyage insured, through ignorance
of captain, though it avoid policy, is not barra-
try, 139
On policy for goods, "*against sea risk and fire
only*," ship was carried out of her course by a
king's vessel, and being afterwards released,
proceeded on the voyage, and sustained *sea
damage*, underwriters held liable, id.
Policy on ship *with or without letters of marque*,
giving leave to chase, capture, and man prizes,
will not warrant after capture *shortening sail
and laying to* for protection of prize, although
port within voyage insured, id.
nor authorize direct cruising out of the voy-
age, 140

DOUBLE-ASSURANCE

- different from *Re-assurance*, and is not void, 64
Cases in which double insurances may be made, 65

EAST INDIA VOYAGES,

- Usage of trade in respect of, 27-28

EMBARGO.

- Ship arriving at a port where an *embargo* is pre-
viously laid, and the day after extended to her,
not deemed moored in safety 24 hours, 23
Effect of *embargo* by this country on ship insured
here; any act done in contravention of *embargo*
is illegal, 80-158

ENEMY,

- trading with, illegal, 158
as also insurance on *enemy's* ships, id.
but *enemy's* ships taken, and condemned as law-
ful prize, may become entitled to privileges and
advantages of British ships, id.

FIRE, ISURANCE AGAINST

- Definition, 216
Construction thereon, id.
Clause of *London Assurance* and some other offi-
ces that they do not hold themselves liable for
any loss or damage by fire happening by any in-

FIRE—*continued.*

- vasion of foreign enemy, or any military or usurped power,* 217
- Question, what species of insurrection should be deemed a *military or usurped power,* id.
- Held to extend only to houses set on fire by means of an invasion from abroad, or internal rebellion when armies are employed to suppress it, id.
- Proviso against *civil commotion* by *Sun Fire Office* deemed good, 218
- Loss happening within 15 days appointed for renewal of Policy, but before premium paid, does not entitle assured to recover, 219
- Notice of *Phoenix Company*, that they would hold themselves liable for loss during 15 days notwithstanding above judgment, 220
- When fire happens, insured must give immediate notice, and make proof of loss by affidavit, &c. and produce certificate from churchwardens, &c. id.
- Printed proposal, requiring certificate, held as part of the policy, and that such certificate is a condition *precedent* to right of assured to recover, and cannot be dispensed with, 220-21
- When loss is settled and adjusted, sufferers are to receive immediate satisfaction without any deduction, id.
- Offices liable for partial losses, id.
- Policies are not in their nature assignable, 222-3-4-5-6
- Except where person dies, policy and interest shall continue to the heir, executor, &c. id.
- Assignment executed after loss null and void, 222-9
- No Insurance takes place till premium actually paid, 229
- Amount of premiums, id.
- On notice from office to pay increased premium, if insured do not comply, they cannot recover, 231
- FOREIGN PROPERTY.**
- Doubts as to extension of 19 G. 2. c. 37. with regard to Insurance on *foreign property,* 149
- FRAUD.**
- Annuls all policies, 121
- Various cases of fraud, id.

FRAUD—*continued.*

<i>Misrepresentation</i> will avoid policy equally as <i>fraud</i> ,	124
In all cases of <i>fraud</i> , immaterial whether it be act of person himself or his agent,	125
Policy will not be set aside on the ground of <i>fraud</i> , unless fully and satisfactorily proved,	id.
Positive and direct proof of <i>fraud</i> not necessary,	126
Statutes for punishment of <i>fraud</i> in policies,	129
1 Ann. st. 2. c. 9. s. 4.	
4 Geo. 1. c. 12. s. 3.	
43 Geo. 3. c. 113. s. 1.	

FREIGHT

Cannot be recovered by insured, if accident prevent ship from sailing,	34
But if policy be a valued one, and part of cargo on board, <i>freight</i> may be recovered,	25
Where ship chartered from A. to B. to take goods and proceed to C. for which <i>freight</i> was to be paid at so much per ton, policy attached from sailing of ship,	id.
No insurable interest in <i>freight</i> , unless legal transfer of ship,	27
Insured cannot recover, if ship does not carry her <i>freight</i> to its destined port,	31
Insurance for <i>freight</i> will attach while delivering outward cargo and before homeward one shipped,	36

ILLEGAL VOYAGES.

Insurance made on <i>voyage</i> prohibited by law, void <i>ab initio</i> ,	157
--	-----

INFRACTION OF TREATY.

Condemnation of ship on ground of <i>infraction of treaty</i> , in not being properly documented, &c. conclusive against a warranty of neutrality,	42
--	----

INSURANCE

on seamen's wages prohibited,	8
"on goods" generally, does not include goods lashed on deck, captain's clothes, or ship's provisions,	14
"on ship and furniture" includes provisions sent out for use of crew,	15

INSURANCE—*continued.*

- "on goods till safely landed" damaged in lighter,
 renders underwriter liable, 16
 may be effected on profits of a cargo, 8
 on a fort against attacks of an
 enemy, id.
 on goods though purchased with
 proceeds of a former illegal car-
 go, id.
 on imaginary profit, 9
 on enemy's property prohibited, id.
 cannot be effected on slaves in certain cases, 17
 on alien property, cannot extend to cover any loss
 during *existence of hostilities* between the coun-
 tries of the assured and assurer, 32
 on freight will attach while delivering outward
 cargo, and before homeward one shipped, 36
 made in order to protect smuggled goods, or in
 contravention of Navigation Acts, void, 163
 So are such on goods contraband of war, 164
 on privateer valued at 1,000*l.* for cruize of 4
 months, *without further account*, and free from
 average. Crew mutinied, and benefit of cruize
 was lost; but ship was in safety at expiration
 of 4 months. Underwriters not liable, 15
 Equitable construction as to *Insurance* on mer-
 chandizes &c. from places in *Europe* or *Amer-*
 ica belonging to *Spain* or *Portugal*, 153
 A. having insured 800*l.* on his own ship, and
 being indebted to B. deposits with him several
 securities, and makes an assignment of ship.
 Underwriters cannot defend on ground of A.
 having no interest, 154
 upon joint capture by army and navy, officers and
 crews before condemnation, have an *insurable*
 interest, 155
 Insurances made by persons having no interest are
 void, id.
Insurance on colonial produce from *West Indies* to
 Gibraltar is illegal, 159

INSURERS,

who may be,

LICENCE.

Trading under *licence* with an alien enemy for specie and goods brought in his ships, incidentally legalizes insurance on *enemy's ships*, as well as goods of British subject, 35

LIEN

Broker has a *lien* on policies, and though he parts with possession of policy, yet if it returns into his hands *lien* revives, 54

In what case broker has not a *lien*, 18

LIVES, INSURANCE ON,

Definition, 197

Advantages resulting from such insurance, id.

History of different societies, 198-9

Antiquity of this practice uncertain, 200

No insurance can be made, unless person effecting one has an interest in the life insured. 14 Geo.

3. c. 48. s. 1. 201

A person holding a note for money won at play, has not an insurable interest in the *life* of the maker of the note, 202-3

But a creditor has an insurable interest in the life of his debtor, 204

All policies of a gambling nature, or in which there is no interest are void, 203

Policy may be bequeathed to persons not parties to the insurance, and executor may support an action, 204

Fraud affects a life policy the same as another, 205

Risk incurred by underwriter, id.

Loss must happen within time in policy, 206

Full sum must be paid when loss happens, 207

Doubts as to extension of 19 Geo. 2. c. 37. s. 2. to life policies removed, 208-9

Above act held to extend to bonds for payment of annuity, id.

Statute of *James* construed to extend to goods of *third person*, 210

Formerly a doubt, when a policy was to run from the date thereof till that day twelvemonth, and the person died on the day named; whether insurer was liable—held that he was, id.

LIVES, INSURANCE ON—*continued.*

- Day of date, &c. shall be either *exclusive* or *inclusive* according to the context and subject matter, 211
- Usual to prevent disputes, to insert in modern policies “ *the first and last days included,*” id.
- Where there is no warranty, underwriter runs the risk of its being a good life or not, 213
- And where there is a warranty, it is sufficient that he is in a reasonable good state of health, for it never can mean that he is free from the *seeds* of disorder, id.
- If even insured laboured under particular *infirmary*, if it is proved that it did not contribute to his death; warranty has been complied with, id.
- When risk once begun, there is no apportionment or return of premium, although it should cease the day after its commencement, 214
- Declaration of person, and apprehension that she could not live ten days longer, admissible evidence to shew her own opinion who best knew, the ill state of her health at time of effecting policy, 215

LOSS.

- what is considered as a total loss, 67
- In what case insured may call upon underwriter for a total loss, id.
- Proof of Interest necessary for total loss on an open policy *aliter*, on a valued one, 68
- Death of slaves by failure of provision, not a *loss* within policy, 69
- Any thing that human prudence could not foresee, or human strength prevent, is a *loss* by peril of the sea, and entitles assured to recover, 68
- Mistake of captain in missing a port, not deemed a *loss* by peril of the sea, 69
- A ship never heard of after her departure, *presumed* to be *lost* at sea, id.
- Usage, in respect of time for *presumption* of *loss*, id.
- Ship destroyed by species of worms, not a *loss* by peril of the sea, 70-71

LOSS—*continued.*

Where ship arrived in port a mere wreck, and in attempting to remove her sunk, although cargo saved and sold to a profitable market, assured recovered, 71

Partial.

Mode by which, *partial loss* may be adjusted, 102

Proportion to be paid by insurer, 102-3

General rules as to *partial loss*, 103

Meaning of *partial loss* when applied to the ship, id.

when to the cargo, 104

Such loss not to fall on the underwriter under 3l. per cent. id.

When goods are partially damaged, underwriter must pay according to *prime cost*, or value in policy, or invoice price, id.

No regard to be paid to rise or fall of market, 104-5

Rule to be adopted where property of various kinds, 105

Underwriters not answerable for *partial loss* to "corn, fish, &c." unless ship stranded, id.

Decision of courts with regard to *partial loss* on "corn, fruit, &c." 106

Where there is a *bonâ fide* stranding, goods excepted in memorandum are subject to *partial loss*, id.

MISREPRESENTATION. See Tit. FRAUD.

NEUTRALITY.

If warranty of *neutrality* be not complied with, contract void *ab initio*, 42

If ship *neutral* at commencement of risk, insurer takes upon him chance of peace or war, id.

Condemnation of ship on ground of infraction of treaty, in not being properly documented, conclusive against warranty of *neutrality*, 44

Warranty of *neutrality* not falsified by sentence of foreign court, id.

Condemnation of goods warranted *American*, though in a ship hired and loaded at London, and destined for the English Islands, not conclusive evidence against warranty of *neutrality*, 45

NEUTRALITY—*continued.*

Condemnation of ship warranted *American*, for want of *role d'équipage* or list of crew, conclusive against warranty of *neutrality*, though really *American*, 45

Warranty of *neutrality* disproved, by master's forcibly rescuing ship to avoid search, 45-6

PAROL EVIDENCE.

where it may reasonably be admitted, 34

PARTIAL LOSS. *See* Tit. LOSS.PERIL OF THE SEA. *See* Tit. LOSS.

POLICY.

its nature, 9-10

different kinds, *id.*

for detention of which *trover* lies, *id.*

Requisites of.

Name of person insured, 11

of ship and master, 12

what is considered as sufficient name, 12-13

of shipping port, 15

of port of destination, *id.*

Time when risk commences, *id.*

when it ends, *id.*

when policy effected, 19

for unloading, not fixed unless unreasonable delay, 15

Stamp on, 19

Whether policy made on ship, goods, or merchandise, 13

Perils must be stated against which underwriter insures, 16

Premium or consideration, 18

Exception in policy to perishable goods, 14

"*on ship and outfit*," cannot be altered to "*ship and goods*," after ship sails, 36

Construction of.

On ship, generally, construed to mean till ship was unladen, 23

But if the usual words "*till moored 24 hours in safety*," insurers not answerable unless loss happen within that time, *id.*

POLICY—*continued.*

- Where ship arrived at wharf 12th January, but could not unload being on outside-tear, with anchors out, &c. and so continued till 19th, when some ice forced her adrift, and she was lost; held to be compleatly moored on the 12th, 24
- On insurance "*at and from*" any place, ship is protected from her first arrival, &c. 25
- On policy from London to Madras and China, with liberty to touch, stay, and trade at any ports, &c. On ship's arrival at Madras she was employed to fetch rice from Bengal, and in second voyage was lost; insured may recover, 28
- Parties may by their own agreement prevent latitude of construction, 29
- Loss must be a direct and immediate consequence, not a remote one, 29-67
- Policies must be construed by the same rules as other instruments, unless by usage of trade, &c. certain words have a peculiar sense, distinct from the ordinary and popular sense, 31
- Assured cannot recover, unless ship is equipped with every thing necessary, and therefore cannot recover if no pilot on board, 143
- What is construed as sufficient covering, 32
- Policy on foreign ship must be understood to except captures made by authority of British Government, id.
- Where a mob seized a vessel with corn, and stranded her, assured could not recover, the word *people* not being construed as *the ruling power*, 34
- What is to be *construed* a commencement of the voyage, 70
- Ship arriving at a port where an embargo is previously laid, and the day after extended to her, cannot be construed to have been moored in *safety* 24 hours, 23-4
- Corn, deemed a general term, and includes peas, beans, and other species of grain, 90
- Construction to be put on the words *unless stranded*, 91

PORT OF LONDON,	
what is so considered	40
PROCEEDINGS.	
Mode of proceeding,	47
Plaintiff, on request in writing, must (by 19 Geo.	
2. c. 37. s. 6.) declare amount of all insurances	
on same ship,	50-55
Action against insurance companies must be <i>debt</i>	
or <i>covenant</i> ,	49
Action against private underwriter <i>indebitatus</i>	
<i>assumpsit</i> , and may be brought in broker's name,	50
The usual <i>plea non assumpsit</i> ,	id.
Proofs necessary on trial,	id.
Consolidation,	id.
Payment of money into court allowed by 19 Geo.	
2. c. 37. s. 7.	50-56
In what case action for money had and received	
lies,	51
Declaration, requisites of,	id.
Though declaration allege <i>total loss</i> , insured may	
recover for <i>partial one</i> ,	id.
Declaration on policy for foreign ship need not	
aver any interest in insured,	52
Averment of interest relates to time of making	
policy,	id.
Where averment is good,	53
Where Dutch commissioners had an insurable	
interest in Dutch ships,	id.
Expenses of salvage not necessary in declaration	
as special breach of policy,	54
Expenses of depositions taken abroad not allowed	
in taxation,	59
Protest of captain delivered by broker to defendant	
will not enable defendant to read it as evidence	
on his part,	62
Of producing instruments at trial,	63
Where some people came on board a ship in a tu-	
multuous manner, and took the government of	
her from captain and crew, and stranded the	
vessel plaintiff could not recover as there was no	
count for <i>stranding</i> ,	91-107

PROCEEDINGS—*continued.*

Contribution of *average* may be recovered by a
suit in equity or action at law, 100

Insured cannot recover unless they make a full
disclosure of circumstances, 126-7

If ship be insured at and from A. to B. and there
be any illegality in the transaction during her
stay at A. assured cannot recover for a loss
happening between A. and B. 128

PROHIBITED GOODS.

Insurances made to protect importation or export-
ation of *prohibited* commodities are void, 161

What are deemed contraband or prohibited goods, 162

Penalty of 500*l.* on persons insuring to import
prohibited goods by 4 & 5 W. & M. c. 15. s. 14.
&c. and 8 & 9 W. 3. c. 36. s. 1. *id.*

QUARANTINE.

Ship ordered to perform *quarantine* after arrival
at her moorings, but before she remained 24
hours, renders underwriter liable, 23

RE-ASSURANCE.

Action not maintainable for premiums on *re-as-*
surance, 19

19 Geo. 2. c. 37. s. 4. renders *re-assurance* unlaw-
ful, unless underwriter should be insolvent, be-
come bankrupt, or die, 84

Assured must state in policy it is a *re-assurance*, *id.*

Usage of other countries in respect of *re-*
assurance, *id.*

RECAPTURE. See Tit. CAPTURE.

RESPONDENTIA. See Tit. BOTTOMRY.

RETURN OF PREMIUM.

If ship arrive before policy is made, and under-
writer is acquainted therewith, but insured is
not, latter is entitled to *return of premium*, 165

But if both parties be ignorant of the arrival, and
the policy (as usual) is *lost or not lost* under-
writer should retain, 166

Clauses inserted in policy, stating that upon a
certain event premium shall be returned, have
a binding operation, *id.*

If no risk run, consideration for premium fails, *id.*

RETURN OF PREMIUM—*continued.*

In a policy where there was a clause that 8 $\frac{1}{2}$ per cent. should be returned if ship sailed from the <i>West India Islands</i> with convoy, and arrives, held that arrival of ship, whether with or without convoy, entitled party to a return of premium,	167
SAILING, <i>Time of,</i>	
may be extended without a new stamp,	35
SALVAGE,	
Definition,	108
Propriety of it,	id.
Expenses of <i>salvage</i> not necessary in declaration as special breach of policy,	54
On payment of <i>salvage</i> , right of original owner preserved to him for ever,	73
In case of wreck or derelict at sea, no positive rate of <i>salvage</i> fixed,	109
Principle of court of admiralty in fixing <i>salvage</i> ,	110
Admiralty will not suffer claim of <i>salvage</i> to be ingrafted on local ignorance of foreigners,	id.
Passenger not entitled to claim <i>salvage</i> ,	id.
But in case where master deserted vessel, and took part of the crew, a person on board as passenger, at the request of remaining crew, took the command, and brought her into port in safety, held to be entitled to <i>salvage</i> ,	id.
Payment of <i>salvage</i> regulated by,	
12 Anne, st. 2 c. 18.	} 111
4 Geo. 1. c. 12.	
26 Geo. 2. c. 19.	
What is a reasonable allowance, ascertainable by three justices of the peace,	id.
Case where captain paying <i>salvors</i> , on his own application, constituted himself agent of the owners,	112
Wearing apparel of master and seamen always exempt from <i>salvage</i> ,	id.
Expense of <i>salvage</i> borne by underwriters,	113
Where <i>salvage</i> is high, insured may abandon,	id.
SEA WORTHINESS,	
Determination in respect of	140
Ground of decision,	141

SEA WORTHINESS—*continued.*

- If ship not *sea worthy* at time of insurance, there is no *contract at all*, 142
 Same doctrine applies to goods, *id.*
 If information as to *sea worthiness* be called for, assured must disclose truly what he knows, 143

SHIP,

- need not be documented as belonging to any particular country, and if captured, owner of goods may recover, 33
Ship arriving at a port where an embargo is previously laid, and the day after extended to her, cannot be said to have been moored in safety twenty-four hours, 23-24
 If *ship* does not carry her freight, insured cannot recover, 31

SLAVE TRADE.

- By stat. 31. Geo. 3. c. 4. s. 7. and 32. Geo. 3. c. 52. for regulating slave trade, certificate of captain having served as required, must be attested by owner, and assured cannot recover unless captain has such certificate, 59
 Death of *slaves* by failure of provision, &c. not a loss within the policy, 70

STRANDING,

- Custom of companies and underwriters in London as to *stranding*, 89
 Companies have left out words "or the ship be *stranded*," and are only liable in case of general average, *id.*
 On insurance upon fruit, and policy contain usual memorandum "corn, fruit, &c." and the ship be in fact *stranded*, underwriters liable for average loss, 90
 Where there is a *bonâ fide stranding*, goods excepted in memorandum are subject to partial loss, 107
 Ship running on some wooden piles to keep up shore, and remaining there till they were cut away, deemed *stranded*, 90
 Ship laden with corn, striking on sand-bank in the river Thames, plaintiff recovered for average loss, 91

STRANDING—*continued.*

Construction to be put on the words *unless stranded*, 91

UNDERWRITER,

liable if ship not moored twenty-four hours, 23

Underwriter presumed to be acquainted with practice of trade he insures, 26

not liable for sailors' wages and provisions while ship detained to refit, 30

liable if goods damaged in lighter without negligence, 31

Unforeseen separation from convoy renders underwriter liable, 41

Provisions as to underwriter becoming bankrupt, 19 Geo. 2. c. 37. 64

Underwriter not answerable for partial loss to corn, fish, &c. 105

On *French* property in time of *peace* not liable for loss by capture by king's ship during hostilities, though they terminated prior to action, 159

UNLOADING.

Where ship in *unloading* her cargo occupied many days in fishing, and was captured, insurer liable by usage of trade, 29

Where ship arrived at wharf 12th January, but could not *unload*, being on the outside tire, with anchors out, &c. and continued so till the 19th, when some ice forced her adrift, and she was lost, held to be completely moored on the 12th, 24

VALUED POLICY,

is not a *wager* policy, 155

In case of *valued* policy, assured must recover whole sum, because he could not have any claim for return of premium for short interest if ship arrived safe, 156

On a policy on ship and goods *valued* at so much, on a voyage to *Africa* and the *West Indies*, insured, are entitled to recover on a total loss which happened in the latest period of the voyage, 156

WAGER POLICY.

Wager policies originally bad, 144

Distinction between *interest* and *wager* policies, *id.*

WAGER POLICY—*continued.*

Wager policy, and those interest or no interest,
prohibited by 19 Geo. 2. c. 37. s. 1. 145

Proviso in favour of private ships of war, s. 2. 146

WARRANTY.

What is considered as such, 37

Difference between *warranty* and representation, id.

Various kinds of *warranties*, 38

If ship be *warranted* to sail on *particular day*, and
do not, underwriter is not answerable, 39

Detention of governments no excuse for breach
of *warranty*, id.

Ship touching at place of rendezvous for convoy,
though detained there by an embargo, has com-
plied with *warranty*, id.

If ship *warranted* to sail with convoy, and do not,
underwriter not responsible, 40

Warranty to sail with convoy understood to mean
throughout voyage, id.

Where ship is prevented from joining convoy by
tempestuous weather, yet endeavours to do so,
deemed a satisfaction of *warranty* to sail with
convoy, 41

If *warranty* of neutrality be not complied with,
contract void *ab initio*, 42

Sailing orders necessary to performance of war-
ranty to depart with convoy, unless particular
circumstances exempt insured from general
rule, id.

Where insurance on ship "*called the American
ship President*," taken to be *all name*, and not a
warranty, id.

Warranty that a ship is American property, means
that she is entitled to privileges of American
flag, and if she has no *passport*, it is not compli-
ed with, 43

Such *passport* must express place of habitation of
Commander by Art. 25 of treaty between
America and France, id.

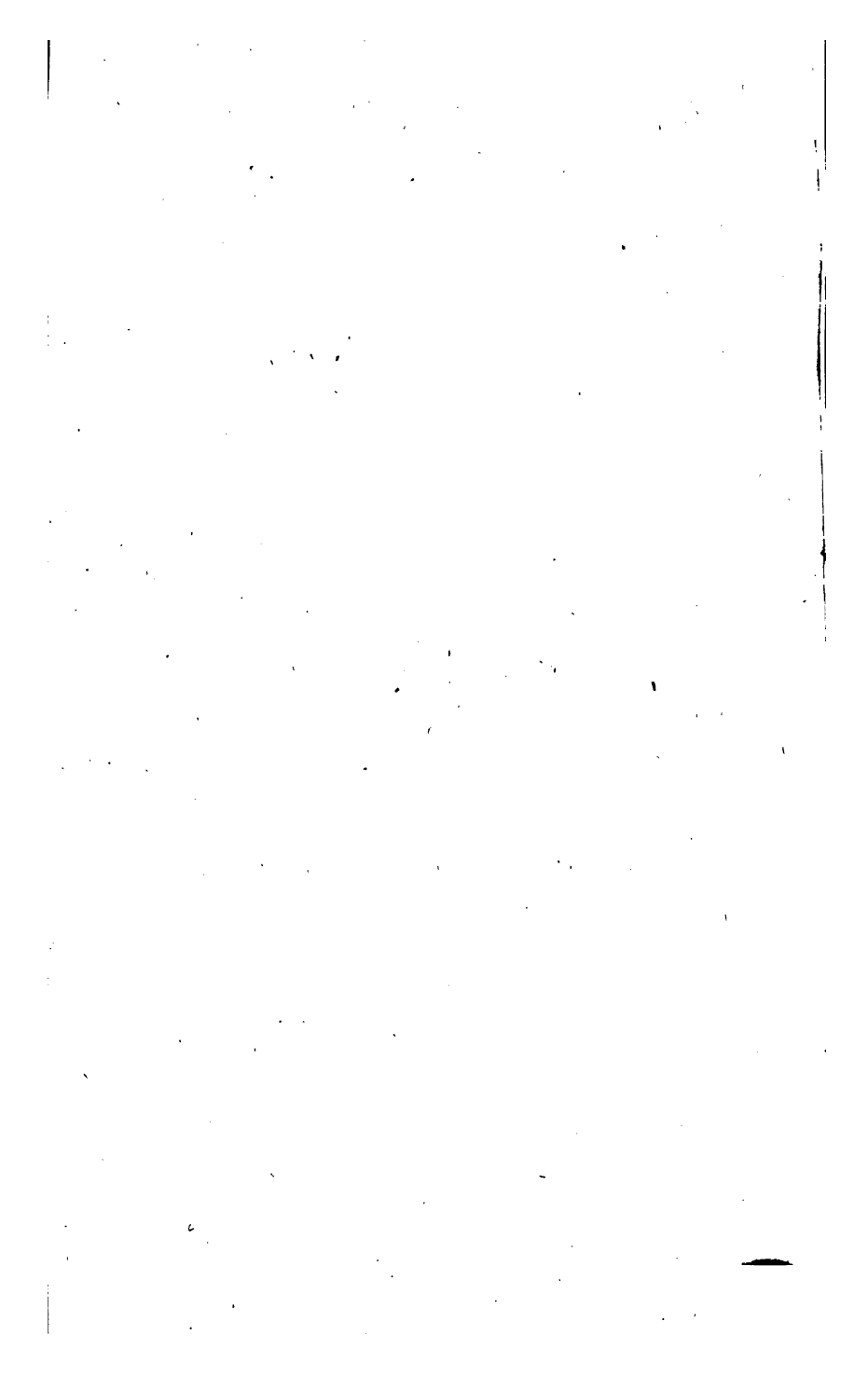
On a *warranty* with convoy from *Hull* to *Bilboa*,
voyage from *Hull* to *Portsmouth*, and thence to
Bilboa, considered distinct, id.

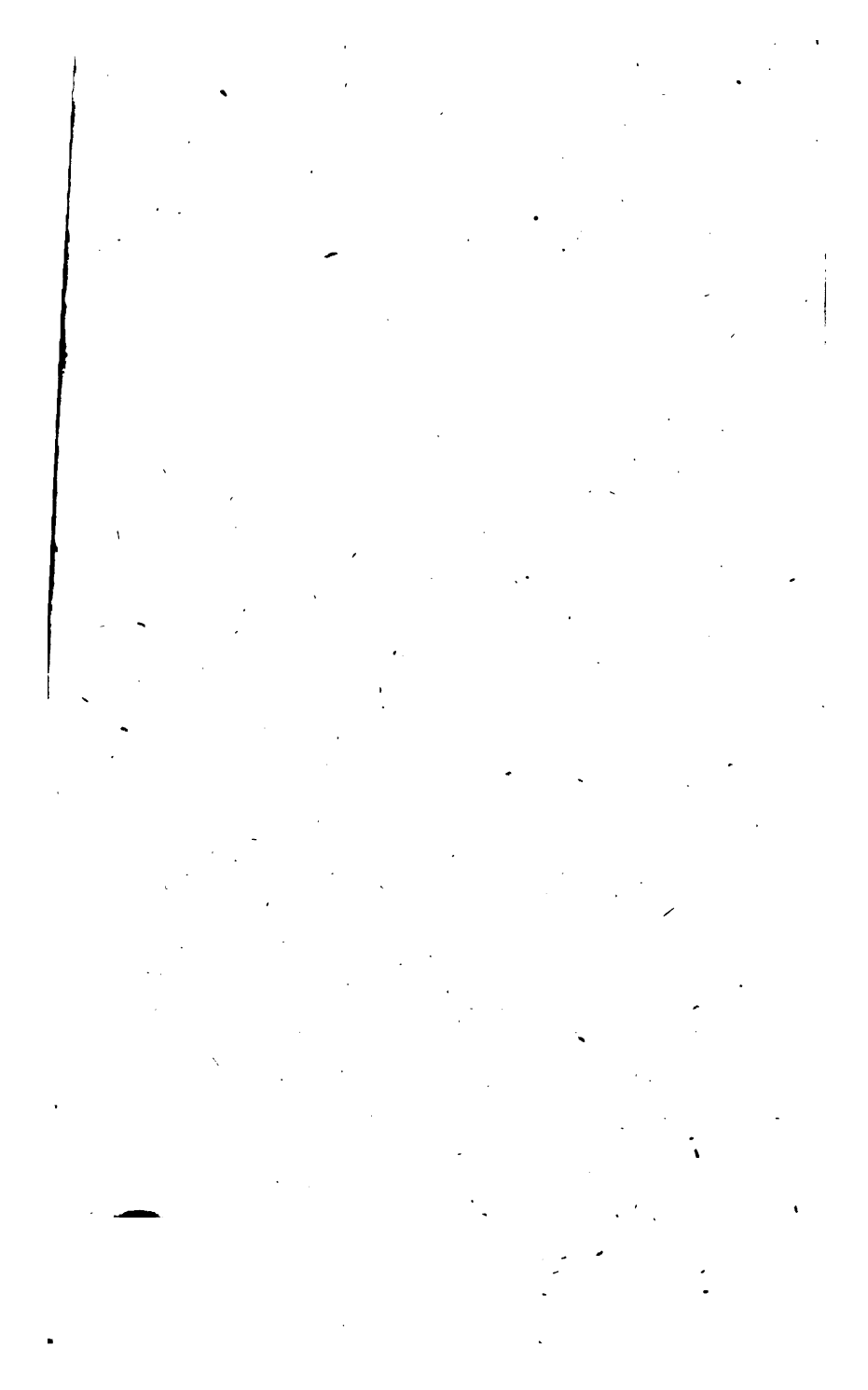
WARRANTY—*continued.*

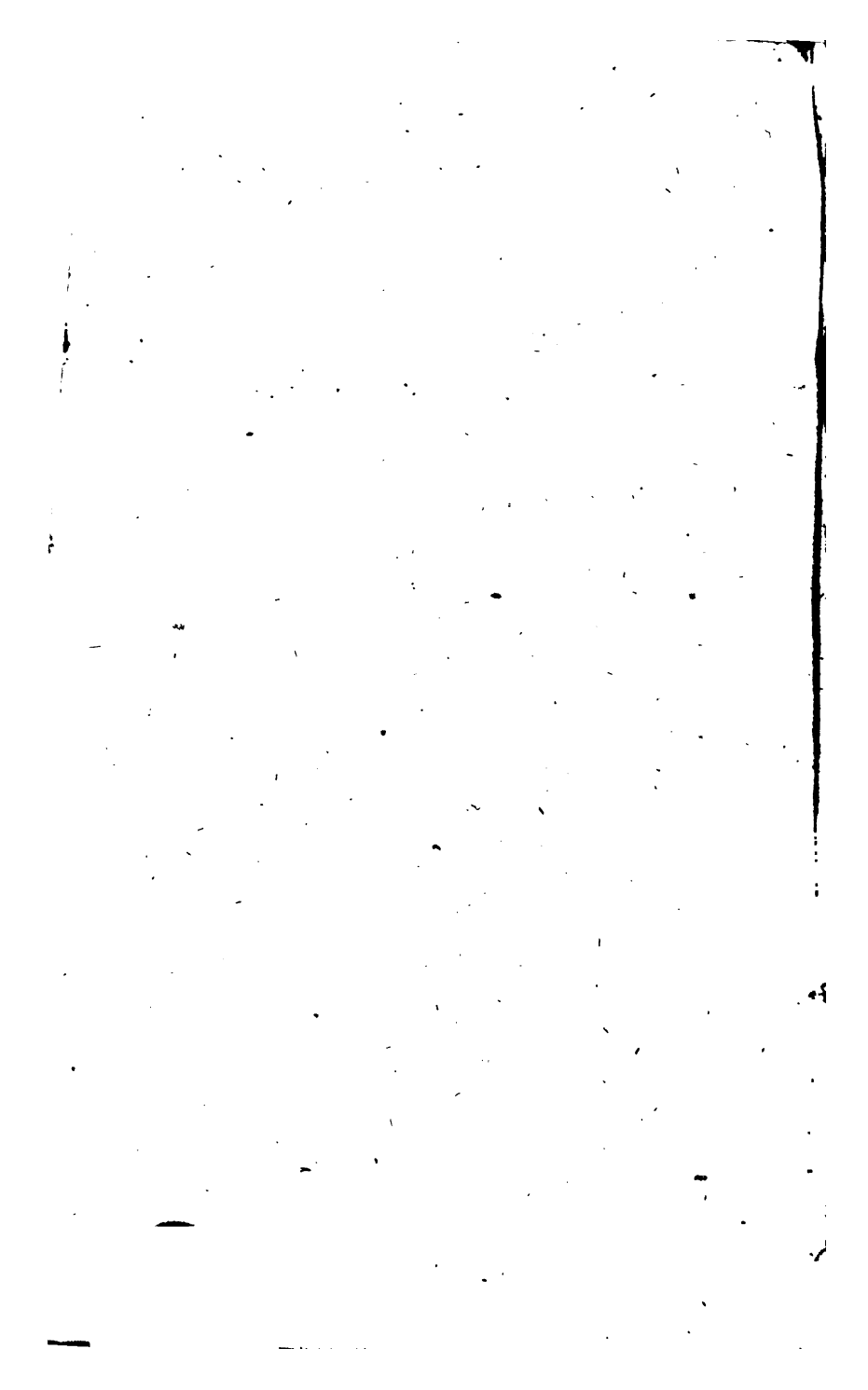
- Warranty* of neutrality not falsified by sentence of foreign court, 44
- Ship condemned on ground of infraction of treaty in not being properly documented, &c. conclusive against *warranty* of neutrality, id.
- Condemnation of goods *warranted* American, though in a ship hired and loaded at London, and destined for the English islands, not conclusive evidence against *warranty* of neutrality, 45
- Ship *warranted* American, condemned for want of *role d'equipage*, or list of crew, conclusive against *warranty* of neutrality, though really American, id.
- Warranty* of neutrality disproved by master's forcibly rescuing ship to avoid search, 45-6
- Forfeiture of neutrality by act of assured or master, after commencement of voyage, a breach of *warranty*, 46

THE END.









FF AAR DNC
A compendium of the law of mar
Stanford Law Library



3 6105 044 426 521